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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FREIGHTLINER CORPORATION,
Petitioner,

v.

BEN MYRICK and EMILY MYRICK,
Respondents.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,
Petitioner,

v.

JACK LINDSEY, Executor of the Estate and Surviving Spouse of Grace C. Lindsey,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the National Traffic and Motor Vehicle Safety Act preempts state common-law standards that conflict with federal standards adopted pursuant to the Act for reasons of safety and practicability; or whether, as the Eleventh Circuit held, one sentence in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992), forecloses such preemption.

RULE 29.1 STATEMENT

Petitioner Freightliner Corporation has no subsidiaries other than wholly owned ones. Freightliner owns a 20% interest in KCSI, Inc. Its parent corporations are Daimler-Benz North America Corporation and Daimler-Benz A.G. Petitioner Navistar International Transportation Corp. is a subsidiary of Navistar International Corporation. Navistar International Transportation Corp. owns more than 99% of Grimsby Insurance Co., Ltd., which is not publicly traded.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners Freightliner Corporation and Navistar International Transportation Corp. hereby petition for a writ of certiorari to review the judgment of the Eleventh Circuit in this case. Based on its reading of *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), the Eleventh Circuit held that the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (recently recodified at 49 U.S.C. §§ 30101-30169), does not

preempt a state common-law determination that motor vehicles are defectively designed if they lack antilock brakes, even though specific federal regulations on the subject, on grounds of safety and practicability, explicitly provide that such brakes are not required.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 13 F.3d 1516. The opinion of the district court granting Freightliner summary judgment against the Myrick respondents (Pet. App. 34a-42a) is reported at 795 F. Supp. 1139. The opinion of the district court granting Navistar summary judgment against respondent Lindsey (Pet. App. 46a-47a) is unreported.

JURISDICTION

The court of appeals entered judgment on February 11, 1994. Pet. App. 1a. Rehearing was denied on May 18, 1994. Pet. App. 49a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The National Traffic and Motor Vehicle Safety Act, as codified at all times relevant to this case, provided in pertinent part:

15 U.S.C. § 1392

(a) The Secretary shall establish by order appropriate Federal motor vehicle safety standards. Each such Federal motor vehicle safety standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.

* * * *

(d) Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in

effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

* * * *

(f) In prescribing standards under this section, the Secretary shall—

(1) consider relevant available motor vehicle safety data, including the results of research, development, testing and evaluation activities conducted pursuant to this chapter;

(2) consult with the Vehicle Equipment Safety Commission, and such other State or interstate agencies (including legislative committees) as he deems appropriate;

(3) consider whether any such proposed standard is reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed; and

(4) consider the extent to which such standards will contribute to carrying out the purposes of this chapter.

* * * *

15 U.S.C. § 1397

(k) Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

On July 5, 1994, Congress recodified the Act "without substantive change" (Pub. L. No. 103-272, 108 Stat. 745, 941). The new Code provisions, in relevant part, are as follows:

49 U.S.C. § 30103. Relationship to other laws

(b) PREEMPTION.—(1) When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. However, the United States Government, a State, or a political subdivision of a State may prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard under this chapter.

(2) A State may enforce a standard that is identical to a standard prescribed under this chapter.

* * * *

(e) COMMON LAW LIABILITY.—Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.

* * * *

49 U.S.C. § 30111. Standards

(a) GENERAL REQUIREMENTS.—The Secretary of Transportation shall prescribe motor vehicle safety standards. Each standard shall be practicable, meet the need for motor vehicle safety, and be stated in objective terms.

(b) CONSIDERATIONS AND CONSULTATION.—When prescribing a motor vehicle safety standard under this chapter, the Secretary shall—

(1) consider relevant available motor vehicle safety information;

(2) consult with the agency established under the Act of August 20, 1958 (Public Law 85-684, 72 Stat. 635), and other appropriate State or interstate authorities (including legislative committees);

(3) consider whether a proposed standard is reasonable, practicable, and appropriate for the particular type of motor vehicle or motor vehicle equipment for which it is prescribed; and

(4) consider the extent to which the standard will carry out section 30101 of this title.

STATEMENT

A divided court of appeals held, contrary to the law in other federal and state appellate courts, that state common law is outside the preemptive reach of the National Traffic and Motor Vehicle Safety Act regardless of any actual conflict it may present with federal law. In particular, the court ruled that a State, as long as it acts through its common law, may require a motor vehicle manufacturer to adopt a particular safety measure on an aspect of performance specifically addressed by federal regulations, where the regulations explicitly consider that measure and, on grounds of safety and practicability, declare that it is not required. The court rested this holding on its view that one brief passage in the Court's opinion in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), radically altered traditional methods of interpreting the preemptive reach of federal law. This petition asks this Court to review the Safety Act ruling and the interpretation of *Cipollone* on which it rests.

A. Federal Law Background

The National Traffic and Motor Vehicle Safety Act, enacted in 1966, directs the Secretary of Transportation —now through his delegee, the National Highway Transportation Safety Administration (NHTSA)—to regulate motor vehicle safety by promulgating national safety standards. 15 U.S.C. § 1392. (For convenience, we cite to the codification used in the courts below and in all of the opinions on the issue.) The statute provides that the standards "shall be practicable, shall meet the need for motor vehicle safety and shall be stated in objective terms." *Id.* § 1392(a). *See also id.* § 1392(f)(3). It provides specifically for States to play a consultative role in the agency's standard-setting process. *Id.* § 1392(f)(2). Once a standard is set, however, the statute mandates national uniformity (*id.* § 1392(d)):

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

That preemption provision is immediately followed by two exceptions allowing States to enforce standards on safety matters covered by federal regulations—where the state standard is identical to the federal standard and where vehicles used by the state government itself are involved. *Id.* § 1392(d). A subsequent provision of the Act adds: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k).

Exercising its statutory responsibility, NHTSA has issued safety standards addressing many aspects of vehicle design and performance. The regulation at issue in this

case governs safety relating to stopping—specifically, the performance of truck air brake systems, 49 C.F.R. § 571.121 (Standard 121). That regulation went through several stages, ultimately resulting in a deliberate choice by the agency *not* to require antilock brakes for trucks.

As originally promulgated, NHTSA's regulation required vehicles to stop within certain distances, at specified speeds, without any significant lockup. *See* 35 Fed. Reg. 10368 (1970). The effect was to require all truck manufacturers to equip their vehicles with antilock brake systems. *See Paccar, Inc. v. National Highway Traffic Safety Admin.*, 573 F.2d 632, 639 n.26 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978). The regulation was challenged on the ground that, rather than promoting safety, it increased the danger of accidents and therefore was not reasonable or practicable (15 U.S.C. § 1392(a), (f)(3)) in light of present technology. The Ninth Circuit agreed with the challenge and suspended the requirement for trucks until NHTSA could find that such systems could be reliably produced:

> [T]he comprehensive data before us indicate that there is a strong probability that the performance of a substantial number of vehicles whose braking systems have been altered to include . . . antilock devices has created a potentially more hazardous highway situation than existed before the Standard became operative. Therefore, until such time as NHTSA develops evidence that the new braking systems required by the Standard do not create the possibility of greater danger to the public, those parts of the Standard requiring . . . the antilock device should be suspended.

Paccar, 573 F.2d at 643; *see id.* at 639.

The agency responded by revising its regulation to add a specific statement that antilock-brake and related requirements were not applicable to trucks and trailers. *See* 44 Fed. Reg. 46849 (1979); 44 Fed. Reg. 53166 (1979);

44 Fed. Reg. 57100 (1979). The agency left in place the performance criteria for those manufacturers who chose to install antilock brakes. *See* 44 Fed. Reg. 46849 (1979). Trucks were then and are now subject to many standards for airbrake systems and safety in stopping, of course, but the regulations have at all times relevant to this case contained the explicit provision, based on safety and practicability considerations, declaring installation of antilock brakes not to be required. Standard 121 § S3 (regulations requiring antilock brakes "are not applicable to trucks and trailers").[1]

B. This Litigation

This case involves two separate but materially identical tort actions. Respondent Ben Myrick was injured in a collision with a tractor-trailer in Georgia. He and his wife, respondent Emily Myrick, brought an action in a Georgia state court against Freightliner, the manufacturer of the tractor.[2] Respondent Jack Lindsey's wife was killed in a collision with a tractor-trailer. As executor and surviving spouse, Lindsey then brought a state-court action against Navistar, whose corporate predecessor had

[1] In 1990 NHTSA announced its intention to consider reinstatement of the antilock-brake requirement, in light of technological advances. *See* 55 Fed. Reg. 44738 (1990). In June 1992, the agency issued an advance notice of proposed rulemaking to achieve that result. *See* 57 Fed. Reg. 24212 (1992). At present, however, the regulation has not been modified: it still expressly makes the use of antilock brakes an option, rather than a requirement, for the manufacturer.

As noted below, the Eleventh Circuit's ruling in this case is in no way limited to the particular antilock-brake regulation, but by its terms deprives *any* NHTSA safety standard, present or future, of preemptive effect against any common-law standards, no matter how inconsistent with federal standards.

[2] The suit also named Freuhauf Corporation, a trailer manufacturer, but the case against Freuhauf was dismissed with prejudice by agreement. Pet. App. 3a n.1. Freuhauf is no longer a party to the case.

manufactured the tractor. Both suits were removed to federal court in Georgia based on diversity jurisdiction. 28 U.S.C. §§ 1332, 1441.

Both actions alleged liability under Georgia law, based entirely on the lack of antilock brakes. In the court of appeals' words, the Myricks "alleg[ed] that the absence of anti-lock brakes was a negligent design and rendered the tractor defective." Pet. App. 3a (footnote omitted). Similarly, Lindsey "alleged that Navistar's failure to supply anti-lock brakes was a negligent design which rendered the tractor defective and unsafe." *Id.* at 3a-4a.

Petitioners moved for summary judgment in each case on the ground that, since the federal regulation on braking systems makes the use of antilock brakes optional, the Safety Act preempts state tort law claims alleging that the absence of such brakes is a defective design. The district court in each case agreed. In the *Myrick* case, Judge Forrester concluded:

> Not only would a common law standard requiring the installation of antilock devices conflict with the federal standard, it would defeat the policy behind the Safety Act by imposing a design requirement that the Department of Transportation judged to be unsafe, having chosen not to require such devices until they are more reliable.

Pet. App. 41a. In the *Lindsey* case, Judge Shoob adopted Judge Forrester's reasoning as "persuasive." Pet. App. 47a.

C. The Court of Appeals Decision

The court of appeals, in a 2-1 decision, reversed. Pet. App. 1a-33a. The majority explained that the Eleventh Circuit had held in *Taylor v. General Motors Corp.*, 875 F.2d 816 (1989), *cert. denied*, 494 U.S. 1065 (1990), that the Safety Act preempted a common law tort action for failure to install a safety device (there, air bags) that

the federal regulations on the subject specifically said was not required. Pet. App. 2a. And it recognized that *Taylor* was indistinguishable from the present case. *See id.* at 10a ("In both cases, the claims were premised on a failure of the manufacturers to install specific safety devices in their vehicles, and in both cases a safety standard established under the Act effectively gave the manufacturers the option of not installing the device."). The panel majority concluded, however, that *Taylor*'s preemption holding must be overruled in light of this Court's decision in *Cipollone*. *Id.* at 2a, 11a.

The majority rested its conclusion on a rigid division between express and implied preemption and on one sentence from *Cipollone* (112 S. Ct. at 2618), which it read as adding "a new wrinkle to the fabric of pre-emption law by holding that where a federal statute contains an express pre-emption clause, and that clause 'provides a "reliable indicium of congressional intent with respect to state authority," ' a court should not consider implied theories of pre-emption." Pet. App. 9a-10a; *see also id.* at 14a ("we hold today: where, as here, there is an express pre-emption provision, which constitutes a reliable indicium of congressional intent, implied pre-emption analysis has no place"). Finding that principle applicable to the Safety Act, because "the reliable indicium requirement is not much of a hurdle" (*id.* at 18a), the court restricted itself to "express preemption" analysis. *Id.* at 10a-11a, 19a-20a. With respect to the text of the Safety Act, then, the panel did not dispute—what is not seriously disputable since *Cipollone*—that the preemption clause of the Act, read by itself, would preclude state common-law standards differing from federal regulatory standards.[3]

[3] This Court recently made just this point with respect to a pre-emption provision that, without specific mention of "common law," covered any state "law, rule, regulation, order, or standard relating to railroad safety." 45 U.S.C. § 434. The Court said: "Legal duties imposed on railroads by the common law fall within the

The court concluded, however, that the "savings clause" in a separate provision of the Safety Act, 15 U.S.C. § 1397(k), required a different result, saving common law claims even if, as here, they would conflict in precisely the way the *Taylor* court had held forbidden. Pet. App. 24a; *see also id.* at 20a-22a (insisting on reading preemption and savings clauses together).

Judge Hill dissented, explaining (Pet. App. 33a (footnote omitted)):

> [T]he effect of a prevailing claim of common law negligence for failure to equip the trucks with antilock brakes would be the same as if the State of Georgia enacted a statute saying that a manufacturer cannot sell for use in Georgia any truck without antilock brakes. As noted above, Standard 121 expressly permits manufacturers to install airbrake systems on trucks and trailers. If the Supremacy Clause means anything, it must mean that federal law prevails in this conflict.

The Eleventh Circuit subsequently denied rehearing (Pet. App. 48a-49a), but it stayed the issuance of the mandate to permit Freightliner and Navistar to file this petition (*id.* at 50a-51a).

REASONS FOR GRANTING THE PETITION

Until the decision by the Eleventh Circuit in this case, it was well settled in the courts of appeals that a State may not impose a safety standard through a common-law determination of defective design when federal regulations on the same aspect of motor-vehicle performance have explicitly determined, on grounds of safety and practicability, that such a standard shall not be required. The decision below squarely rejects that proposition, which remains the law in several other circuits and States. In-

scope of these broad phrases." *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1737 (1993) (citing to *Cipollone*).

deed, the decision expressly allows all state common-law standards, no matter how starkly inconsistent they may be with federal standards adopted under the Safety Act. The decision thereby creates a sharp conflict on this obviously recurring and important issue, freeing each State in the Eleventh Circuit (through its juries) to require antilock brakes, air bags, or other safety features that the federal government, in setting safety standards under the Act, has specifically rejected on grounds of safety and practicability.

The court of appeals felt compelled to breach the consensus on this issue by its reading of one passage from this Court's decision in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992). But that reading of *Cipollone* is incorrect, as other circuits have recognized. And in any event, what is critical for present purposes, this reading provides no basis for speculating that the clear present appellate-court conflict on the Safety Act will eventually disappear by itself, without this Court's involvement. Indeed, state appellate courts and federal district courts have found preemption under the Safety Act since *Cipollone*. Moreover, in order to reverse themselves as the Eleventh Circuit has done, the federal circuits that found preemption before *Cipollone* would have to repudiate their express conclusions on two issues that cannot logically be affected by *Cipollone*: first, whether the Eleventh Circuit's dispositive principle, by which certain express preemption clauses preclude any implied preemption analysis, has application to the Safety Act; second, whether the "savings clause" of the Safety Act is properly construed, as the Eleventh Circuit held, expressly to save all common-law claims. This Court should take this case because the lower court conflicts are clear now and will predictably persist.

Beyond the conflicts, there can be no doubt about the importance of the issue presented. The Eleventh Circuit's ruling by its terms applies not just to the many accidents

plaintiffs may attribute to the absence of antilock brakes, and not just to the many injuries plaintiffs may attribute to the absence of air bags, but to any motor vehicle accident, in the past and into the future, where the plaintiff seeks a common-law standard inconsistent with federal law, as by requiring a safety measure that federal law on the same aspect of performance has specifically said, on grounds of safety and practicability, is not required. Respondents' own counsel confirmed the impact of this ruling when he said that it now "would be foolish," indeed "below the standard of care" for attorney malpractice, if counsel for plaintiffs did *not* include a design-defect claim such as one challenging the omission of air bags. A. Grossman, "Auto Makers Liable for Lack of Airbags?" *Lawyers Weekly*, Mar. 14, 1994, at p. 1.

1. The Eleventh Circuit decision creates a sharp appellate-court conflict on the issue of Safety Act preemption. The leading and most comprehensive of the federal circuit decisions is the First Circuit's decision in *Wood v. General Motors Corp.*, 865 F.2d 395 (1988), *cert. denied*, 494 U.S. 1065 (1990). The court canvassed the language, purpose, and history of the Safety Act and concluded, directly contrary to the Eleventh Circuit holding here, that the Act preempted a state-law claim that was inconsistent with federal law—particularly, a claim of defect based on failure to provide a safety feature (air bags) specifically addressed, but made optional, by a federal standard.

The First Circuit recognized that the finding needed for the alleged design-defect liability would be "tantamount to announcing a state safety standard (vehicles must have air bags) that differs from the federal safety standard covering the same aspect of performance (viz., the relevant federal standard permits seat belts in lieu of air bags)." *Id.* at 401. The court observed that "[s]uch a safety standard, if promulgated by state statute or regulation, would be preempted by the clear commands of section 1392(d)," which it noted, "says nothing about

being limited to *legislatively* established state standards." *Ibid.* The court concluded, however, that the "savings clause," 15 U.S.C. § 1397(k), while not preserving common law claims that "conflict with the relevant federal standard" (865 F.2d at 401, 402 (footnote omitted)), made it impossible to determine from the express statutory language, without more, that Section 1392 preempted the state tort action alleging defective design. *Id.* at 402. The court found no "express preemption" because "Congress did not, in the language of the Safety Act, make an explicit statement regarding preemption of state claims that create, in effect, a state design standard not identical to a federal standard." *Id.* at 407.

The First Circuit nevertheless concluded that "Congress's purposes, as revealed in the Safety Act and in the legislative history, plainly *imply* a preemptive intent." *Id.* at 402. Classing its analysis as one of "implied preemption" (*id.* at 407), the court undertook a full analysis of the logic of the Act and the legal context into which it had been placed upon enactment in 1966. It concluded, in particular, that because "Congress in 1966 did not contemplate the likelihood that there would be a state tort action that would effectively create a state design standard conflicting with a federal safety standard . . . as no reason appears in the legislative history or comes to mind as to why Congress would have meant to endorse a state claim having the same effect as a forbidden state regulation," it could not find "that Congress meant to sanction the 'tension' between the [Safety Act] and state common law existing in the current situation" (*id.* at 403). The court therefore followed this Court's direction in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), to "look to interference with Congress's chosen method as well as to the ultimate goal of the statute." 865 F.2d at 408. Under the Safety Act, that method would unquestionably preempt "a nonconforming . . . *regulation* issued by the Massachusetts legislature or state or local agency" and "the effect [of the tort action] would be similar," because

" 'regulation can be as effectively exerted through an award of damages as through some form of preventive relief.' " *Id.* at 408, 409, 410 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)).

The First Circuit's decision in *Wood* was subsequently followed by the Tenth Circuit in *Kitts v. General Motors Corp.*, 875 F.2d 787 (1989), *cert. denied*, 494 U.S. 1065 (1990), which briefly explained: "[f]or our purposes, *Wood* is almost identical to the cases before us" and "correctly resolves the issue before us." *Id.* at 789. The Third Circuit reached the same conclusion, though in a lengthier opinion. *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, *cert. denied*, 498 U.S. 853 (1990). The court explained that "common law liability for the failure to install air bags or automatic safety belts would directly undermine the regulatory framework" under the Act by effectively destroying the option provided in the federal standard. *Id.* at 1124-25. The tort action was therefore impliedly preempted, and "a savings clause like § 1397 (k) does not 'save' common law actions that would subvert a federal statutory or regulatory scheme." *Id.* at 1125.

Various state appellate courts and federal district courts have reached the same conclusion (using somewhat varying analyses). *See, e.g., Boyle v. Chrysler Corp.*, 501 N.W.2d 865 (Wis. Ct. App. 1993); *Marrs v. Ford Motor Co.*, 852 S.W.2d 570 (Tex. Ct. App. 1993); *Meier v. Nissan Motor Co.*, 261 Cal. Rptr. 80 (Ct. App. 1989), *cert. denied*, 494 U.S. 1066 (1990); *Gardner v. Honda Motor Co.*, 536 N.Y.S.2d 303 (App. Div. 1988), *appeal dismissed*, 543 N.Y.S.2d 401 (1989); *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. Ct. App. 1987), *cert. denied*, 487 U.S. 1236 (1988); *Miranda v. Fridman*, No. A-3651-92T1 (N.J. App. Div. July 21, 1994); *Gills v. Ford Motor Co.*, 829 F. Supp. 894 (W.D. Ky. 1993); *Cox v. Baltimore County*, 646

F. Supp. 761 (D. Md. 1986); *Tammen v. General Motors Corp.*, No. 93-1477 (D. Kan. June 24, 1994); *Estate of Montag v. Honda Motor Co.*, 1994 U.S. Dist. LEXIS 9063 (D. Colo. 1994).

These decisions squarely conflict with the Eleventh Circuit decision in this case. The Eleventh Circuit readily agreed that the state common-law actions at issue here are inconsistent with federal law under the Safety Act in precisely the same sense, the ordinary "conflict" preemption sense, as the common-law actions were inconsistent with federal law in the foregoing (air bags) cases: in both situations, the state-law claim would defeat an option granted by federal law (Pet. App. 10a). That is why the Eleventh Circuit found it necessary to overrule its own prior *Taylor* decision in order to reach its conclusion of no preemption here. The Eleventh Circuit's holding—that there is no preemption of state common-law standards under the Safety Act, even when they concededly conflict with federal law—is directly contrary to all of the above-cited case law.[4]

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[4] In rejecting express preemption, the Eleventh Circuit in *Taylor* mentioned the absence of explicit reference to "common law" in Section 1392(d). *See* 875 F.2d at 824-25. The panel in this case nowhere repudiated this point; indeed, it declared itself bound by *Taylor*'s rejection of express preemption. Pet. App. 24a. The view that a preemption provision like Section 1392(d) does not cover common-law standards in the absence of a specific reference to "common law," aside from being patently incorrect (*see* note 3, *supra*), is inconsistent with the law in many other circuits. *E.g.*, *Mendes v. Medtronic, Inc.*, 18 F.3d 13 (1st Cir. 1994); *King v. Collagen Corp.*, 983 F.2d 1130 (1st Cir.), *cert. denied*, 114 S. Ct. 84 (1993); *King v. E.I. Dupont de Nemours & Co.*, 996 F.2d 1346 (1st Cir.), *cert. dismissed*, 114 S. Ct. 490 (1993); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993); *Stamps v. Collagen Corp.*, 984 F.2d 1416 (5th Cir.), *cert. denied*, 114 S. Ct. 86 (1993); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993); *Kinley Corp. v. Iowa Utils. Bd.*, 999 F.2d 354 (8th Cir. 1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir.), *cert. denied*, 114 S. Ct. 60 (1993).

2. Resolution of these clear conflicts should not be postponed to await possible action by the lower courts to dissolve the conflicts themselves. Not only would delay impose unwarranted costs and uncertainty of potentially enormous magnitude, but there is nothing but speculation to support the possibility that *all* of the many courts that have found preemption will now change course and agree with the Eleventh Circuit that *Cipollone* mandates a finding of no preemption. In fact, any such speculation is worse than unsupported; it is highly implausible.

First, several courts have already found preemption under the Safety Act since *Cipollone*. *Boyle v. Chrysler*, 501 N.W.2d 865 (Wis. Ct. App. 1993); *Marrs v. Ford Motor Co.*, 852 S.W.2d 570 (Tex. Ct. App. 1993); *Miranda v. Fridman*, No. A-3651-92T1 (N.J. App. Div. July 21, 1994); *Gills v. Ford Motor Co.*, 829 F. Supp. 894 (W.D. Ky. 1993); *Tammen v. General Motors Corp.*, No. 93-1477 (D. Kan. June 24, 1994); *Estate of Montag v. Honda Motor Co.*, 1994 U.S. Dist. LEXIS 9063 (D. Colo. 1994).[5] This alone shows the unlikelihood of the widespread overruling of binding precedent that would be needed for all the lower courts to bring themselves into alignment with the Eleventh Circuit.

Second, each of the leading federal circuit decisions has already rejected at least one premise that is both necessary to the Eleventh Circuit's ruling and wholly unaffected by *Cipollone*. In particular, the First Circuit decision in *Wood*, on which the Tenth Circuit relied in *Kitts*, specifically concluded that, even if there is a principle that some express preemption provisions exclude implied preemption analysis, that principle is *inapplicable* to the Safety Act. 865 F.2d at 414. And the First Circuit also specifically concluded that the "savings clause" of the Safety Act is *not* properly construed to save all common

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[5] Recently, a Missouri appellate court first found preemption and then changed its mind based on the Eleventh Circuit decision here. *Loulos v. Dick Smith Ford, Inc.*, 1994 Mo. App. LEXIS 852 (Mo. Ct. App. 1994). The case is still pending on appeal.

law claims, including those in conflict with federal law. 865 F.2d at 402. On this latter point, the Third Circuit in *Pokorny* agreed: "it is well-established that a savings clause like § 1397(k) does not 'save' common law actions that would subvert a federal statutory or regulatory scheme." *Pokorny*, 902 F.2d at 1125, citing *International Paper Co. v. Ouellette*, 479 U.S. 481, 492-94 (1987); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328-31 (1981); *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915); *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) (even broad savings clause does not save those common law rights "the continued existence of which would be absolutely inconsistent with the provisions of the act," since the statute cannot be read to "destroy itself"). The Eleventh Circuit's finding of no preemption necessarily and explicitly rests on the opposites of *both* of those propositions.

Neither of these two necessary steps in the Eleventh Circuit's reasoning could possibly be affected by *Cipollone*. With respect to the preemption principle the Eleventh Circuit found in *Cipollone*, the First Circuit *assumed* the validity of the principle, but then found it inapplicable to the Safety Act. *Wood*, 865 F.2d at 414 ("even if Wood's principle were correct, it would not apply in the present case"). With respect to savings clauses, *Cipollone* could not conceivably have changed the established law because the statute at issue did not involve a savings clause. Indeed, the traditional approach to savings clauses (*see Pokorny, supra*) was well established at the time Congress enacted the Safety Act (*see, e.g., Abilene Cotton*, 204 U.S. at 446), was followed by this Court only three weeks prior to its decision in *Cipollone* (*see Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992)), and was followed yet again last Term (*John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 526 (1993) (a broad savings

clause would not be read to preserve a state law that otherwise undermined congressional objectives)).

3. Even if the specific bases of its decision had not already been rejected on grounds unaffected by *Cipollone*, the Eleventh Circuit's reading of *Cipollone* itself is so flawed that it is exceedingly unlikely that all of the circuits and state courts that have found preemption will now abandon their conclusions in light of *Cipollone*. The Eleventh Circuit, in overruling its prior *Taylor* decision, necessarily agreed with petitioners that the common-law actions at issue here are inconsistent, in the ordinary "conflict" preemption sense, with Standard 121 and the Safety Act: the state claims would defeat the option granted by federal law (Pet. App. 10a). The Eleventh Circuit nevertheless rejected preemption based entirely on its view that *Cipollone* meant, in a single sentence, to revolutionize preemption law for statutes containing preemption provisions by excluding all inquiry into whether particular state laws are consistent with the statute and regulations implementing it, read as a whole. But that view of *Cipollone* and of preemption law—which itself has been rejected by other circuits [6]—cannot be right.

To begin with, nothing in the *Cipollone* sentence that the Eleventh Circuit fixed upon hints that it is repudiating, as the Eleventh Circuit concluded, clear and repeatedly relied-on preemption principles. Pet. App. 5a-6a, 9a-11a. To the contrary, the Court in *Cipollone* said that it

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[6] In addition to the circuit-court cases cited at note 4, *supra*, and note 9, *infra*, see *Jackson v. Culinary School of Washington, Ltd.*, 1994 U.S. App. LEXIS 15602, *29 n.12 (D.C. Cir. June 24, 1994): "We do not read *Cipollone* to stand for the proposition that the enumeration of preempted areas in a statute forecloses altogether the possibility that state statutes in actual conflict can be preempted. The overriding focus of preemption analysis is on the intent of Congress. *See CSX Transp., Inc.*, [113 S. Ct. at 1737]; *Cipollone*, 112 S. Ct. at 2617. Where a state statute actually frustrates the purposes of Congress, we do not believe that the specific preemption clauses in a statute alone provide a 'reliable indicium of congressional intent with respect to state authority.' *Cipollone*, 112 S. Ct. at 2618."

was following a "familiar" principle—that an express preemption provision *may* define the outer limits of congressionally intended preemption.[7] Moreover, three Justices who were necessary to form a majority for this portion of the opinion (Chief Justice Rehnquist and Justices White and O'Connor) only one week earlier had specifically taken the very approach that the Eleventh Circuit found forbidden by *Cipollone,* concluding that a statute containing an express preemption provision "impliedly pre-empted" state law that was "in conflict with the full purposes and objectives" of the federal statute. *Gade v. National Solid Wastes Management Ass'n,* 112 S. Ct. 2374, 2383 (1992) (O'Connor, J., joined by Rehnquist, C.J., White, J., and Scalia, J.). It cannot sensibly be assumed that these Justices meant in *Cipollone* to reject their own approach from the week before.

The Eleventh Circuit's reading of *Cipollone* is also at odds with what the Court has done since. The very next Term, the Court made clear in *CSX* that the "plain wording" of a preemption clause was to be looked to "in the first instance" (113 S. Ct. at 1737), but not exclusively. Rather, the standard remained one of "pre-emptive purpose" to be "sought in the text *and structure* of the statute at issue." *Ibid* (emphasis added). Indeed, after the Court concluded that one state-law claim was not expressly preempted, based in part on consideration of the scheme as a whole (*id.* at 1739-40), the Court addressed implied preemption, rejecting it *not* by declaring it unavailable with a citation to *Cipollone,* but on the merits. *Id.* at 1742 n.12 ("We reject petitioner's claim of implied 'conflict' preemption . . . on the basis of the preceding analysis.").

Similarly, last Term, in *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank,* 114 S. Ct. 517 (1993), the Court reaffirmed the applicability of traditional "con-

[7] The *Cipollone* Court cited to *California Federal Sav. & Loan Ass'n v. Guerra,* 479 U.S. 272, 282 (1987), and *Malone v. White Motor Corp.,* 435 U.S. 497, 505 (1978). 112 S. Ct. at 2618.

flict" preemption analysis under a statute containing an explicit preemption provision—even in the presence of a broad savings clause. The Court specifically held that ERISA's savings clause for state insurance law does *not* save state laws that would violate the Supremacy Clause under ordinary conflict preemption principles. "[W]e discern no solid basis for believing that Congress, when it designed ERISA, intended fundamentally to alter traditional preemption analysis. State law governing insurance generally is not displaced, but 'where [that] law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress,' federal preemption occurs." *Id.* at 526. With respect to general preemption principles as well as the interpretation of savings clauses, that ruling cannot comfortably be squared with the Eleventh Circuit's decision in this case.

Not only does *Cipollone* fail to support the Eleventh Circuit's rigid separation of express and implied preemption, repudiation of implied preemption, and cramped, mechanical view of express preemption analysis; it points in the very opposite direction. A majority of the Court, in applying the express language of the statute at issue, made clear that analysis of a preemption provision, though starting with a presumption against preemption, must account for language, origins, statutory context, and purpose—as ordinary statutory interpretation does. 112 S. Ct. at 2618-21, 2624 n.27 (plurality opinion); *id.* at 2634-36 (opinion of Scalia and Thomas, JJ.). This more robust view of the scope of "express preemption," with its consideration of normal statutory implications, was foreshadowed by the Court's previous recognition that express and implied preemption were hardly "rigidly distinct" forms of analysis (*English v. General Elec. Co.,* 110 S. Ct. 2270, 2275 n.5 (1990)) and has been confirmed by the Court's subsequent preemption decisions, with their reliance on statutory "purpose" and "structure" (*CSX,* 113 S. Ct. at 1737) and the " 'purposes and objectives of Congress' " (*John Hancock,* 114 S. Ct. at 526). *See*

also Livadas v. Bradshaw, 114 S. Ct. 2068, 2075 n.11, 2083-84 (1994) (describing as "entirely semantic" the difference between a preemption claim "rooted in the text" and one "implicit in the structure of the Act").

Accordingly, to the extent that *Cipollone* is relevant to the Safety Act, it hardly excludes consideration of whether state law defeats the functioning of the federal statutory scheme at issue here.[8] Rather, in addition to making indisputable that the Safety Act's preemption provision applies to common-law standards (*see* note 3, *supra*), *Cipollone* clarifies that the core inquiry into the consistency of federal and state law is a proper part of express preemption analysis, quite apart from any separate "implied preemption" analysis. Indeed, several courts of appeals, including another panel of the Eleventh Circuit, have relied on *Cipollone* to hold that the very analysis they had formerly conducted under "implied preemption" actually supports a finding of "express preemption."[9]

Finally, *Cipollone* itself stands squarely against the Eleventh Circuit's reading of Section 1397(k). The court carried out nothing like the sort of careful statutory analysis that *Cipollone* mandates.[10] And it arrived at the very

[8] *See* pages 7-10, *supra*; H.R. Rep. No. 1776, 89th Cong., 2d Sess. 17 (1966) (Act is "intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than by a multiplicity of diverse standards."); S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966) ("The centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country.")

[9] *See Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir.), *cert. denied*, 114 S. Ct. 60 (1993); *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir.), *cert. denied*, 114 S. Ct. 300 (1993). *See also Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993).

[10] The court ignored the placement of the provision by the 1966 Congress five sections after the preemption provision, which itself

same formalistic and implausible conclusion that this Court rejected in *Cipollone*—that a State may frustrate federal law by using its common law to achieve the same regulation that it is forbidden to achieve by explicit statute or rule. This Court should correct this erroneous reading of the Safety Act and the reading of *Cipollone* on which it is based.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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contained two genuine savings clauses of its own. *Compare CSX*, 113 S. Ct. at 1738 (the preemption provision itself "displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express saving clauses"). The court also ignored the difference between section 1397(k)'s language and the typical language used to save state causes of action from preemption. *See, e.g., John Hancock, supra; Morales, supra; Guerra, supra.* Similarly, the court did not pause to consider the First Circuit's explanation that Section 1397(k) may readily be construed to reach common law suits other than those inconsistent with federal law. *Wood*, 865 F.2d at 404-06, 414-16. And the Court made no mention of the 1991 legislation (directed at airbags) in which Congress, having been apprised of the then-unbroken *Wood* line of cases, specifically indicated that it did "not want by this section to change the law on liability as it existed prior to enactment." H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 403 (1991); *see* 15 U.S.C. § 1392 note (Pub. L. No. 102-240, § 2508(d), 105 Stat. 2086).

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 92-8386, 92-8387 and 92-8536

BEN MYRICK and EMILY MYRICK,
Plaintiffs-Appellants,

v.

FREUHAUF CORPORATION,
Defendant,

FREIGHTLINER CORPORATION,
Defendant-Appellee.

JACK LINDSEY, Executor of the Estate of GRACE C. LINDSEY, Deceased, JACK LINDSEY, as Surviving Spouse of GRACE C. LINDSEY Deceased,
Plaintiff-Appellant,

v.

NAVISTAR INTERNATIONAL TRANSPORTATION CORPORATION,
Defendant-Appellee,

INTERNATIONAL HARVESTER COMPANY,
Defendant.

Appeals from the United States District Court
for the Northern District of Georgia

Feb. 11, 1994

Before EDMONDSON and CARNES, Circuit Judges, and HILL, Senior Circuit Judge.

CARNES, Circuit Judge:

This consolidated appeal presents the question of whether a common law tort action for failure to install anti-locking brakes in a tractor-trailer truck is pre-empted by provisions of the National Traffic and Motor Vehicle Safety Act ("the Safety Act"), Pub. L. No. 89-563, 80 Stat. 718 (1966) (codified at 15 U.S.C. §§ 1381-1431). This Court answered a similar question arising under the same statute in *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir.1989), *cert. denied*, 494 U.S. 1065, 110 S.Ct. 1781, 108 L.Ed.2d 783 (1990), which held that a common law tort action for failure to install air bags was pre-empted by the Safety Act. The Supreme Court's exposition of pre-emption law in an intervening decision, *Cipollone v. Liggett Group, Inc.*, —— U.S. ——, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992), requires that we revisit our *Taylor* decision in order to determine how much of it survives *Cipollone* and whether the surviving portion of *Taylor* controls these cases.

FACTS AND PROCEDURAL HISTORY

The complaint in the Myrick case alleges that an eighteen wheel tractor-trailer was proceeding south on a highway in Morgan County, Georgia. Because of slowing traffic ahead, the driver applied the brakes which caused the rear wheels to lock and the trailer to jackknife and

swing across the center divider into the path of oncoming traffic. Plaintiff Ben Myrick had the misfortune to be in a northbound vehicle on the same highway at the critical time. The jackknifing trailer collided with his vehicle. As a result, Mr. Myrick suffered serious injury; he is permanently paraplegic and brain damaged. Neither the tractor nor the trailer that collided with Mr. Myrick's vehicle had an anti-locking brake system.

Mr. Myrick filed a lawsuit in state court against the manufacturer of the tractor, the Freightliner Corporation, and the manufacturer of the trailer, the Freuhauf Corporation, alleging that the absence of anti-lock brakes was a negligent design and rendered the tractor defective.[1] His wife, Emily Myrick, asserted a separate claim for loss of consortium. The defendants removed the case to federal court based on diversity of citizenship.

The facts alleged in the Lindsey case are similar. A tractor-trailer rig was proceeding south on a highway in Oconee County, Georgia when the driver applied the brakes because an automobile stopped in front of it. The wheels locked, the trailer began to jackknife and slid across the center lane into the northbound lane of traffic. This time the victim was Grace Lindsey, whose automobile was proceeding north when it collided with the jackknifed trailer. Mrs. Lindsey was killed. Neither the tractor nor the trailer was equipped with an anti-locking brake system.

Mrs. Lindsey's husband, Jack Lindsey, filed a lawsuit in state court against Navistar International Transportation, the manufacturer of the tractor.[2] He alleged that Navistar's failure to supply anti-lock brakes was a negli-

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[1] The case against Freuhauf was dismissed with prejudice by agreement of the parties.

[2] The International Harvester Company, Navistar's corporate predecessor, was dismissed pursuant to a stipulation that Navistar had assumed the liability, if any, of International Harvester.

gent design which rendered the tractor defective and unsafe. Navistar removed the case to federal court based on diversity of citizenship.

Both lawsuits were decided in United States District Court for the Northern District of Georgia, 795 F.Supp. 1139. In the Myrick case, the district court granted summary judgment on behalf of the defendants on grounds that the action was impliedly preempted by the Safety Act and regulatory standards adopted under it. The court found the matter to be controlled by this Court's holding in *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir.1989), *cert. denied*, 494 U.S. 1065, 110 S.Ct. 1781, 108 L.Ed.2d 783 (1990). Four days after the order in the nature of an opinion was entered in the Myrick case, a different judge of the same district court reached the same result in the Lindsey case. In doing so, he adopted the reasoning of the order in the Myrick case and found the cause of action to be preempted by the federal act and regulatory standards.

This Court consolidated the two cases for purposes of appeal. Because the issues are identical and joint briefs have been filed on both sides, we will refer to the plaintiffs in the two cases collectively as "Plaintiffs," and we will refer to the remaining defendants in both cases collectively as "Manufacturers." [3]

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[3] In their complaint, the Myricks averred not only common law causes of action but also a statutory cause of action based upon allegations that the Manufacturers' efforts to secure favorable regulation had violated the Georgia RICO statute. The district court found that the Myricks' statutory cause of action as well as the common law causes of action were pre-empted. On appeal, the Myricks, joining with Lindsey who alleged only common law claims, have argued only against pre-emption of the common law claims. They apparently have abandoned any contention that the state statutory claim is not pre-empted. Therefore, we will confine our discussion and holdings to the common law causes of action.

ANALYSIS

I. PRE-*CIPOLLONE* PRE-EMPTION LAW

The laws of the United States are the supreme law of the land, any state constitution or law notwithstanding. U.S. Const. art. VI, cl. 2. Thus, state law may not override or interfere with federal laws. That is the core premise of pre-emption doctrine. On the other hand, "[i]n the interest of avoiding unintended encroachment on the authority of the States, . . . a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption. Thus, pre-emption will not lie unless it is 'the clear and manifest purpose of Congress.' " *CSX Transportation, Inc. v. Easterwood*, —— U.S. ——, ——, 113 S. Ct. 1732, 1737, 123 L.Ed.2d 387 (1993) (citation omitted). *See also Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26, 97 S.Ct. 1305, 1309-10, 51 L.Ed.2d 604 (1977); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). The Supreme Court has instructed us that state law is pre-empted by federal law in three circumstances:

> First, Congress can define explicitly the extent to which its enactments pre-empt state law . . . .
>
> Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it". . . .
>
> Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements. . . .

English v. General Elec. Co., 496 U.S. 72, 78-79, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65 (1990); *See also Michigan Canners and Freezers Assoc. v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 469, 104 S.Ct. 2518, 2523, 81 L.Ed.2d 399 (1984); *Easterwood v. CSX Transportation, Inc.*, 933 F.2d 1548, 1552 (11th Cir.1991), *aff'd*, —— U.S. ——, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993). We must apply these principles and relevant case law to determine if the Plaintiffs' claims, premised on the Manufacturers' failure to install anti-locking brakes, are pre-empted by the Safety Act.

II. THE SAFETY ACT AND THE *TAYLOR* DECISION

The Safety Act authorizes the extensive regulation of commercial trucks including the vehicles involved in these cases. Numerous safety standards have been established by the National Highway Traffic Safety Administration pursuant to the Act, including a standard, applicable at the relevant times in these cases, that effectively gave manufacturers the choice of whether to install anti-lock brakes. The Safety Act includes a pre-emption clause which provides:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d). Additionally, the Safety Act contains a savings clause:

> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

Id. § 1397(k).

In *Taylor*, a panel of this Court decided the question of whether the Safety Act pre-empts state common law causes of action arising out of the failure of automobile manufacturers to install air bags in their vehicles. We addressed the pre-emption question in two parts: first express pre-emption, and then implied pre-emption. We recognized that a successful state tort action based on the failure of a manufacturer to install air bags would have an effect similar to a state regulation requiring installation of air bags. 875 F.2d at 824 n. 16. Nonetheless, this Court held that such tort actions were not expressly pre-empted by the Safety Act. *Id.* at 825. We began by recognizing that "a strong presumption exists against finding express pre-emption when the subject matter, such as the provision of tort remedies to compensate for personal injuries, is one that has traditionally been regarded as properly within the scope of the states' rights." *Id.* at 823. In view of that presumption, we recognized our task as being "to determine whether the language of the Safety Act 'unmistakably' manifests an intent to pre-empt appellants' common law claims." *Id.* We held that it did not.

In the *Taylor* case, safety standards that had been established under the Act provided for the installation of either seat belts or air bags, giving manufacturers a choice between restraint systems. *Id.* at 822-23. The manufacturers argued that common law tort liability for failure to install air bags was expressly pre-empted by the Safety Act's pre-emption clause. This Court rejected that argument, because the Act's savings clause plainly stated that compliance with any safety standard did not exempt anyone from common law liability. *Id.* at 823-25. The manufacturers urged that the savings clause should be narrowly interpreted to preserve common law liability only

for defects that were not specifically addressed by a safety standard promulgated under the Act. We rejected that argument, because such a construction "would render the savings clause a mere redundancy since the pre-emption clause itself provides that where a federal standard does not govern 'the same aspect of performance' as the state standard, the state standard is not pre-empted." *Id.* at 824. Recognizing our duty to give effect to every clause of a statute, we rejected the manufacturers' proposed construction of the savings clause because "it would render an entire section of the Safety Act superfluous." *Id.*

We also gave another reason for rejecting the manufacturers' argument that the Safety Act expressly pre-empted common law tort actions on defects that were addressed by a safety standard. We said:

> An additional factor militating against a finding that the language of the Safety Act expressly pre-empts appellants' claims is that Congress did not make explicit reference to state common law in the Act's pre-emption clause as it has in the pre-emption clauses of many other statutes. Congress has long demonstrated an aptitude for expressly barring common law actions when it so desires. The absence of such an explicit reference to state common law in the Safety Act's pre-emption clause therefore counsels against a finding of express pre-emption.

Id. at 824-25 (citations omitted). We ended our discussion of the express pre-emption issue by stating our holding as follows:

> Given the conflict between the language of the Safety Act's pre-emption and savings clauses, and the failure of Congress explicitly to include reference to state common law in the Act's pre-emption clause, we conclude that the Safety Act cannot be construed as unambiguously manifesting an intention to pre-empt appellants' common law claims. We therefore

> hold that appellants' claims are not expressly pre-empted by the Safety Act.

Id. at 825. In a footnote to that holding we said:

> We conclude only that the language of the Safety Act is too ambiguous to manifest a Congressional intent to pre-empt appellants' common law claims under an express pre-emption analysis; we do not find to the contrary—that the Safety Act's savings clause unmistakably manifests an express intention on the part of Congress to preserve appellants' common law claims.

Id. at 825 n. 18.

After holding in *Taylor* that state tort actions premised on a defect specifically addressed by a safety standard promulgated under the Safety Act were not expressly pre-empted, this Court turned to the question of implied pre-emption. The pertinent safety standard that had been established under the Act granted to manufacturers an option to install air bags or manual seat belts, and we held that "a state common law rule that would, in effect, remove the element of choice authorized [by the Safety Act] would frustrate the federal regulatory scheme." *Id.* at 827. For that reason, we concluded that common law tort claims based on a failure to install air bags were impliedly pre-empted by the Safety Act because they would interfere with and frustrate the methods by which the federal regulations sought to accomplish their goals. *Id.* That is the way the law of this Circuit stood on pre-emption in general and pre-emption under the Safety Act in particular, until *Cipollone* was decided three years later.

III. THE *CIPOLLONE* DECISION AND ITS EFFECT ON *TAYLOR*

The Supreme Court in *Cipollone* added a new wrinkle to the fabric of pre-emption law by holding that where a federal statute contains an express pre-emption clause,

and that clause "provides a 'reliable indicium of congressional intent with respect to state authority,' " a court should not consider implied theories of pre-emption. *Cipollone v. Liggett Group, Inc.*, —— U.S. at ——, 112 S.Ct. at 2618 (citation omitted). The *Cipollone* Court held that the enactment by Congress of such a provision addressing the pre-emptive scope of the statute in which it is contained indicates an intent that all matters beyond the reach of the provision are not pre-empted. Therefore, where there is an express pre-emption provision a court "need only identify the domain expressly pre-empted" by the statutory provisions. *Id.* The *Cipollone* Court reasoned that if Congress had intended further pre-emption it would have said so in the pre-emption provision it included in the act.

It is the law of this Circuit that we are bound by a prior panel's decision except to the extent it is altered by a supervening Supreme Court decision, which we will, of course, follow instead. *E.g., Footman v. Singletary*, 978 F.2d 1207, 1211 (11th Cir.1992); *Lufkin v. McCallum*, 956 F.2d 1104, 1107 (11th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 326, 121 L.Ed.2d 246 (1992). We are bound by the *Taylor* panel's holding, unchanged by *Cipollone*, that the Safety Act does not expressly pre-empt common law liability for a safety defect that is addressed by a safety standard established under the Safety Act. *Taylor* is indistinguishable from this appeal with regard to that holding. The plaintiffs in *Taylor* asserted tort claims sounding in negligence and strict liability, as do the Plaintiffs here. In both cases, the claims were premised on a failure of the manufacturers to install specific safety devices in their vehicles, and in both cases a safety standard established under the Act effectively gave the manufacturers the option of not installing the device. Exactly the same pre-emption clause and savings clause are involved in both cases. Thus, we are bound to conclude that the claims presented by the Myricks and Jack Lindsey in this appeal are not expressly

pre-empted by the Safety Act just as similar claims were held not to be expressly pre-empted by the same act in the *Taylor* case.

Because of the Supreme Court's *Cipollone* decision, however, we are bound not to follow the second part of *Taylor* which held that claims similar to the ones here were barred under the implied pre-emption doctrine. *Cipollone*'s clear instruction that when there is an express pre-emption provision we should not consider implied pre-emption supersedes the second part of *Taylor*. Factoring *Cipollone* into *Taylor* produces a net result of no pre-emption in this case.

IV. THE CONTRARY ARGUMENTS OF THE MANUFACTURERS AND THEIR AMICI

The Manufacturers and their amici suggest that we err by reading *Cipollone* to mean what it says about not considering implied pre-emption when there is an express pre-emption provision in the statute. If we do err we are in good company, because at least eight of our sister circuits have reached the same conclusion about the meaning of the *Cipollone* decision. *Greenwood Trust Co. v. Commonwealth of Massachusetts*, 971 F.2d 818, 823 (1st Cir.1992) ("[T]he High Court has made it pellucidly clear that, whenever Congress includes an express pre-emption clause in a statute, judges ought to limit themselves to the pre-emptive reach of that provision without essaying any further analysis under the various theories of implied pre-emption."), *cert. denied*, —— U.S. ——, 113 S.Ct. 974, 122 L.E.2d 129 (1993); *Toy Manufacturers of America, Inc. v. Blumenthal*, 986 F.2d 615, 623 (2d Cir.1992) ("where a pre-emption provision provides a 'reliable indicium of congressional intent' a court is required to restrict its pre-emption analysis to that clause"); *Worm v. American Cyanamid Co.*, 5 F.3d 744, 747 (4th Cir.1993) ("Articulating a specific approach to interpreting a statute that expressly addresses preemption, the [*Cipollone*] Court limited the task to first determining

whether the relevant provisions reliably indicate congressional intent with regard to preemption of state authority, and second, if so, to interpreting the express language."); *Stamps v. Collagen Corp.*, 984 F.2d 1416, 1420 (5th Cir.1993) ("Applying *Cipollone*, we reject, at the outset, Collagen's contention that we may resort to the doctrine of implied pre-emption . . . ."), *cert. denied*, —— U.S. ——, 114 S.Ct. 86, 126 L.Ed.2d 54 (1993); *American Agriculture Movement, Inc. v. Board of Trade*, 977 F.2d 1147, 1154 (7th Cir.1992) ("Only if a statute is devoid of explicit pre-emptive language may we resort to either variant of implied pre-emption."); *Kinley Corp. v. Iowa Utilities Bd.*, 999 F.2d 354, 358 (8th Cir.1993) ("When Congress has [included] . . . a provision explicitly addressing [pre-emption], and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,' 'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation.' "); *Draper v. Chiapuzio*, 9 F.3d 1391 (9th Cir.1993) (stating that because the federal act under consideration contains an express pre-emption provision which provides a reliable indicium of congressional intent, "[w]e therefore look only to this language and construe its preemptive effect as narrowly as possible"); *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1447 (10th Cir.) ("when the Court recently applied the doctrine of *expressio unius est exclusio alterius* to pre-emption cases, it excluded consideration of all forms of implied pre-emption, including conflict pre-emption"), *cert. denied*, —— U.S. ——, 114 S.Ct. 291, 126 L.Ed.2d 240 (1993). So far as we can ascertain, no circuit has yet had the temerity to tell the Supreme Court that it did not mean what it said in *Cipollone*, and we decline the Manufacturers' invitation to be the first one to do so.

Moreover, two other panels of this Court apparently have reached the same conclusion we reach about the meaning of *Cipollone*. In *Papas v. Upjohn Co.*, 926 F.2d

1019 (11th Cir.1991) (*Papas I*), this Court held that the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") impliedly pre-empted certain claims. *Id.* at 1024-26. We declined to reach the express pre-emption issue about which we admitted "a little uncertainty." *Id.* at 1024. The Supreme Court vacated and remanded that decision for further consideration in light of its *Cipollone* decision. *Papas v. Zoecon Corp.*, —— U.S. ——, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992). On remand, this Court took the hint and re-decided the case solely on express pre-emption grounds. *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir.1993) (*Papas II*). In doing so, we explained that, "[t]o determine FIFRA's pre-emption of the Papases' claims we will 'only identify the domain expressly pre-empted' by FIFRA['s express pre-emption clause]." *Papas II*, 985 F.2d at 518 (quoting *Cipollone*, —— U.S. ——, 112 S.Ct. at 2618).

In *Public Health Trust v. Lake Aircraft, Inc.*, 992 F.2d 291 (11th Cir.1993), another panel of this Court held that the Federal Aviation Act and aircraft design standard regulations promulgated thereunder did not pre-empt a state common law action for the negligent or defective design of an aircraft, even though the aircraft complied with federal design standards. The federal act in that case contained an express pre-emption clause, but the district court had found implied pre-emption. In reversing, this Court cited *Cipollone* for the proposition that "where Congress has with words pre-empted some kinds of state lawmaking, courts are cautious about relying on implied pre-emption theories to limit state authority further." *Id.* at 294. Finding that the pre-emption clause in the act was a reliable indicium of Congress' intent on state authority to regulate civil aviation, and that that pre-emption clause did not bar such lawsuits, this Court concluded that they were not pre-empted. Id. at 295. Consistently with the *Cipollone* rule, no implied pre-emption analysis was conducted.

The actions of the *Lake Aircraft* panel and of the *Papas II* panel constitute acknowledgment of that which we hold today: where, as here, there is an express pre-emption provision, which constitutes a reliable indicium of congressional intent, implied pre-emption analysis has no place.

This cannot be so, the Manufacturers argue, because a decision the Supreme Court issued just six days before *Cipollone* is inconsistent with the interpretation of *Cipollone* that we and five other circuits have reached. In *Gade v. National Solid Wastes Management Assoc.*, —— U.S. ——, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992), the Court held that state laws that address public safety as well as occupational safety were pre-empted by the Occupational Safety and Health Act ("OSHA"), which has the single purpose of furthering occupational safety. While the main thrust of the *Gade* decision was that state laws with purposes different from a federal law may still be pre-empted, a plurality of the Court reached this decision under an implied pre-emption theory despite OSHA's express pre-emption clause. *Id.* at ——, 112 S.Ct. at 2383. A fifth member of the Court, Justice Kennedy, joined in the result, but would have found the state laws expressly pre-empted by OSHA. *Id.* at ——, 112 S.Ct. at 2388-39. The Manufacturers argue that the Supreme Court could not have intended the rule announced in *Cipollone* because the analysis in *Gade* is inconsistent.

We are bound to follow an applicable holding of a majority of the Supreme Court, and the rule in *Cipollone* was announced by a majority of the Supreme Court. The inconsistency the Manufacturers would ascribe to *Gade*, by contrast, can be drawn only from a plurality opinion. As we have held before, "[a] plurality opinion is not binding on this Court and we are compelled to follow both our precedent as well as prior Supreme Court precedent. . . ." *Foster v. Board of School Comm'rs*, 872

F.2d 1563, 1569-70 (11th Cir.1989) (citations omitted); *accord, Johnson v. Dugger*, 911 F.2d 440, 471 n. 76 (11th Cir.1990), *cert. denied*, —— U.S. ——, 113 S.Ct. 361, 121 L.Ed.2d 274 (1992).

Because the rationales adopted by the plurality and Justice Kennedy are at odds with each other, the only holding in *Gade* is the result that OSHA pre-empts state laws which regulate in an area regulated by OSHA, regardless of whether the state law has an ancillary purpose. This narrow holding does not compel us to conclude that the Court did not mean what it said six days later in *Cipollone*. Moreover, *Cipollone* came after *Gade*, not the converse. If there is any conflict or inconsistency of holdings we would be bound to follow the more recent of the two decisions. The pronouncement in *Cipollone* was from a majority of the Court, not a mere plurality; it is the more recent exposition; and it is binding on this Court, notwithstanding the implications that the Manufacturers would have us draw from other cases.

The Manufacturers further contend that the Supreme Court could not have intended to exclude forays into implied pre-emption analysis based upon the existence of an express pre-emption provision because in earlier cases a majority of the Court did consider implied pre-emption in the face of an express pre-emption clause. To support their proposition they cite *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990), where the Court held that ERISA expressly and impliedly pre-empted a state common law claim that an employee was discharged to prevent him from obtaining benefits under an ERISA-covered plan. In reaching its holding, the Court construed ERISA's express pre-emption provision to bar the common law action. *Id.* at 140, 111 S.Ct. at 484. As an alternative holding, the Court decided that "[e]ven if there were no express pre-emption," the state cause of action would be impliedly pre-empted because it directly conflicted with a cause of action under ERISA. *Id.* at 142, 111 S.Ct. at 484-85.

The *McClendon* decision did not hold, as the Manufacturers would have us conclude, that where an express pre-emption clause does not pre-empt claims, those claims can nonetheless be barred under implied pre-emption doctrine. Therefore, *McClendon* does not squarely conflict with the rule of *Cipollone*. Even if it did, we would follow the more recent *Cipollone* decision. We decline to allow a contrary inference drawn from an earlier case to overcome the direct teaching of a more recent Supreme Court instruction on how we are to consider claims of pre-emption. Therefore, the rule announced and applied in *Cipollone*, that implied pre-emption should not be used to foreclose a claim where a statute contains an express pre-emption provision which is a "reliable indicium of congressional intent," will be followed by this Court.

A recent, post *Cipollone* pre-emption decision of the Supreme Court buttresses our conclusion. *CSX Transportation, Inc. v. Easterwood,* —— U.S. ——, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993), involved the issue of whether state court negligence claims of excessive speed and absence of warning devices were pre-empted by the Federal Railroad Safety Act (FRSA) and regulations promulgated under it. *Id. at* ——, 113 S.Ct. at 1736. The Supreme Court laid down these rules of decision:

> Where a state statute conflicts with or frustrates federal law, the former must give way. U.S. Const., Art. VI, cl. 2; *Maryland v. Louisiana,* 451 U.S. 725, 746 [101 S.Ct. 2114, 2128, 68 L.Ed.2d 576] (1981). In the interest of avoiding unintended encroachment on the authority of the States, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption. Thus, pre-emption will not lie unless it is "the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 [67 S.Ct. 1146, 1152, 91 L.Ed. 1447] (1947). Evidence of pre-emptive purpose is sought in the text and

> structure of the statute at issue. *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 95 [103 S.Ct. 2890, 2899, 77 L.Ed.2d 490] (1983). If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.

Id. at ——, 113 S.Ct. at 1737. The FRSA, like the Safety Act in this case, has both a pre-emption clause and a savings clause. *Id.* at ——, 113 S.Ct. at 1736. Together, those FRSA provisions expressly pre-empted any state requirement, including one imposed by common law negligence actions, where there was any federal "rule, regulation, order, or standard covering the subject matter of such State requirement." *Id. at* ——, 113 S.Ct. at 1736-37 (quoting 45 U.S.C. § 434).

The *Easterwood* Court applied the pre-emption measure expressly stated in the statute to conclude that a common law claim for the absence of warning devices at grade crossings was not pre-empted. *Id.* at ——, 113 S.Ct. at 1738-42. After a lengthy discussion applying only the measure of pre-emption expressly set out in the FRSA, the Court relegated to one sentence of a footnote its response to an implied pre-emption argument: "We reject petitioner's claim of implied 'conflict' pre-emption . . . on the basis of the preceding analysis." *Id.* at ——, 113 S.Ct. at 1742 n. 12. The "preceding analysis" was the express pre-emption discussion, so, the Supreme Court in that post-*Cipollone* decision did not conduct a separate implied pre-emption analysis where the negligence claim was not barred under the explicit pre-emption provision of the statute.[4] Seven members of the Court joined that part of

[4] We are aware that the one-sentence footnote reference to implied pre-emption in *Easterwood* is not without ambiguity. It might be argued that the Court intended to reject implied pre-emption on the merits for the same reasons it had found no express pre-emption. We resolve that ambiguity in light of the more ex-

the opinion and the two others concurred in it. *Easterwood*, therefore, appears to reinforce the commands of *Cipollone* that where there is an express pre-emption provision, it is to be the alpha and omega of pre-emption analysis.

The Manufacturers also argue that the pre-emption clause in the Safety Act is not a "reliable indicium of congressional intent," and that the *Cipollone* rule is therefore inapplicable. The Supreme Court did condition its *Cipollone* rule on the pre-emption clause being a "reliable indicium of congressional intent," but the Court provided no explanation of that term. We can only infer from the way in which the Supreme Court failed to pause for long over the matter that the reliable indicium requirement is not much of a hurdle. That inference is reinforced by the *Easterwood* decision in which the Court said the task of statutory construction must begin with the plain wording of an express pre-emption clause, and then ended it there as well. There was no mention in *Easterwood* of the "reliable indicium" requirement.

None of our sister circuits that have considered application of the *Cipollone* rule to various statutes have yet found a pre-emption clause that was not a reliable indicium of congressional intent. *See, e.g., Greenwood Trust Co. v. Commonwealth of Massachusetts*, 971 F.2d 818, 823 (1st Cir.1992), *cert. denied*, —— U.S. ——, 113 S.Ct. 974, 122 L.Ed.2d 129 (1993); *Toy Manufacturers of America, Inc. v. Blumenthal*, 986 F.2d 615 (2d Cir.1992); *Stamps v. Collagen Corp.*, 984 F.2d 1416, 1420 (5th Cir.), *cert. denied*, —— U.S. ——, 114 S.Ct. 86, 126 L.Ed.2d 54

plicit statement earlier in the opinion that where there is a pre-emption clause, it is "the best evidence of Congress' pre-emptive intent." —— U.S. at ——, 113 S.Ct. at 1737. A contrary interpretation would mean that just ten months after issuing its clear holding in *Cipollone*, the Supreme Court did an about-face by means of one ambiguous sentence in a footnote, something we find difficult to believe.

(1993); *American Agriculture Movement v. Board of Trade*, 977 F.2d 1147, 1154 (7th Cir.1992); *Weber v. Heaney*, 995 F.2d 872, 875 (8th Cir.1993); *Draper v. Chiapuzio*, 9 F.3d 1391 (9th Cir.1993); *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1444 n. 17 & 1447 (10th Cir.), *cert. denied*, —— U.S. ——, 114 S.Ct. 291, 126 L.Ed.2d 240 (1993). In our own *Papas II* decision, another panel of this Court acknowledged the reliable indicium requirement, but concluded, without much explanation, that that requirement was met. *Papas II*, 985 F.2d at 517.

At the very least, the treatment of the requirement in *Cipollone* and in decisions that have applied the rule of *Cipollone* establish that there is a presumption that a pre-emption clause is a reliable indicium of congressional intent. Such a presumption is in keeping with the general rule of assuming that Congress intended what it said. *See Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164, 105 S.Ct. 638, 645, 83 L.Ed.2d 556 (1985) ("In construing a federal statute it is appropriate to assume that the ordinary meaning of the language that Congress employed 'accurately expresses the legislative purpose.'"); *United States v. Stokley*, 881 F.2d 114, 116 (4th Cir.1989) ("the court must assume the drafters of a statute intended to convey the ordinary meaning attached to the language"); *United States v. Jones*, 811 F.2d 444, 447 (8th Cir.1987) ("it is appropriate to assume that the ordinary meaning of those words [of the statute] accurately expresses the legislative purpose").

Even without such a presumption, we would be convinced that the express pre-emption provisions of the Safety Act are a reliable indicia of congressional intent. The legislative history so indicates. The House Committee Report describes the congressional intent about pre-emption and the purpose of the savings clause which was written into the Act:

> [T]he reported bill provides that compliance with any Federal motor vehicle safety standard does not exempt a person from any liability under common law.
>
> It is intended, and this subsection specifically establishes, that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contracts, and tort liability.

H.R.Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966). The legislative history demonstrates that the pre-emption provisions of the Safety Act, which include the savings clause, are a reliable indicium of congressional intent. *See Public Health Trust v. Lake Aircraft, Inc.*, 992 F.2d 291, 295 (11th Cir.1993), in which we held a pre-emption clause to be a reliable indicium of congressional intent based upon a Tenth Circuit analysis which relied heavily upon a legislative committee report.

Moreover, we are unable to perceive any material difference as it relates to the reliable indicium issue between the pre-emption provisions in this case and the pre-emption provisions that the *Cipollone* Court had no difficulty finding to be reliable indicia in that case. *See Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177, 1179 (10th Cir.1993) (where a pre-emption provision in another statute is similar to the one in *Cipollone*, it, too, provides a reliable indicium of congressional intent).

The Manufacturers argue that the Safety Act delegates rule-making power to a federal agency, and that this difference from the statute in *Cipollone* suggests that Congress' inclusion of the pre-emption clause in the Safety Act could not have been intended as a sole expression of pre-emption. They argue that it is unreasonable for a pre-emption clause to provide the full extent of pre-emption when agency rule-making is expected to occur; therefore, the pre-emption clause cannot be considered a reliable indicium of what Congress intended to pre-empt. This argument fails, however, because it is Congress which has the authority and responsibility for determining the scope of pre-emption. Congress defined the pre-emptive scope of the Act to include safety standards promulgated by an administrative agency, but there is no indication that Congress intended to let the administrative agency decide whether such safety standards would pre-empt state law. That is a decision which Congress itself made in the Safety Act's pre-emption provisions just as it made that decision in the pre-emption provisions involved in *Cipollone*. This argument of the Manufacturers is also rebutted by the *Easterwood* decision, which relied solely upon the pre-emption clause in a statute which delegated rulemaking authority to an executive agency.

Amici for the Manufacturers argue that the pre-emption clause cannot be the sole expression of the Safety Act's pre-emptive scope, because the savings clause also addresses the Act's pre-emption. Since it alone does not cover the field of pre-emption, amici argue, the pre-emption clause cannot be a reliable indicium of congressional intent. This contention echoes the Plaintiffs' argument that a conflict between the savings clause and the pre-emption clause renders the pre-emption clause unreliable as an indicator of intended pre-emption. These arguments rest on a reading of pre-emption "provisions" that is far too narrow. We are concerned with what Congress expressly stated about pre-emption, and in the Safety Act Congress put its statements about pre-emption in two statutory provisions, one of which we refer to as a pre-emption clause and the other one we call a savings clause. Our terminology notwithstanding, both of the clauses are pre-emption provisions in the material sense of the word, because both clauses explicitly deal with the subject of what is and is not pre-empted. Our rejection of this argument finds support in the *Easterwood* decision, because that case also

involved not only a pre-emption clause but also a savings clause.

We did say in a footnote in *Taylor* that "the language of the Safety Act is to ambiguous to manifest a congressional intent to pre-empt appellants' common law claims under an express pre-emption analysis." 875 F.2d at 825 n. 18. That statement does not indicate that the pre-emption provisions of the Safety Act, which are the pre-emption clause and savings clause considered together, are not reliable indicia of congressional intent. Those provisions clearly pre-empt certain state action. For example, a state legislative enactment requiring action forbidden by a safety standard clearly would be pre-empted. That the provisions are not sufficiently clear to pre-empt other state action does not mean that those provisions do not reliably indicate Congress' intent. A recent district court decision takes a contrary approach. In *Gills v. Ford Motor Co.*, 829 F.Supp. 894 (W.D.Ky.1993), the district court concluded that the Safety Act, by virtue of the ambiguity inherent in its pre-emption clause, lacks the "reliable indicium" of congressional intent required by *Cipollone*. *Id.* at 898. The *Gills* decision, like the manufacturers and their amici in this case, fails to give due consideration to the long-standing rule, in the nature of a presumption, that the only state action that is pre-empted is that which Congress has clearly indicated is to be pre-empted. *CSX Transportation, Inc. v. Easterwood*, —— U.S. ——, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993); *Cipollone*, —— U.S. at ——, 112 S.Ct. at 2617; *Jones v. Rath Packing Co.*, 430 U.S. at 525, 105 S.Ct. at 1309; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230, 67 S.Ct. at 1152. Moreover, in Cipollone, seven justices agreed that an express pre-emption provision that provides a reliable indicium of congressional intent moots any implied pre-emption analysis. The same seven justices also agreed that the Public Health Cigarette Smoking Act of 1969 (PHCSA), codified at 15 U.S.C. §§ 1331-1340, contains

such a provision. However, the justices split four to three on the scope of that express pre-emption clause, which was debatable among jurists of reason. In other words, the statutory language was ambiguous. Nonetheless, a majority of the Supreme Court treated the PHCSA as providing a reliable indicium of congressional intent. Thus, Cipollone itself is inconsistent with the notion that ambiguous statutory language cannot provide a reliable indicium of congressional intent. If all that were required to defeat the *Cipollone* rule is for some ambiguity or uncertainty to exist, then few, if any, pre-emption provisions would ever be held to be reliable indicia of congressional intent.[5]

The argument that ambiguity equates with unreliability is also foreclosed by this Court's *Papas* decisions and by *Cipollone* itself. The reason that this Court did not address express pre-emption in its first *Papas* opinion is that the pre-emption provision in that case left us with uncertainty about whether the claim was pre-empted. 926 F.2d at 1023-24. Notwithstanding the ambiguity of that pre-emption provision and our admitted uncertainty about its application, after remand from the Supreme Court for further consideration in light of *Cipollone*, we held that same ambiguous pre-emption provision to be a reliable indicium of congressional intent. 985 F.2d at 517. Moreover, the pre-emption provision involved in one of the statutes in *Cipollone* itself was ambiguous, as is evidenced by the fact that the Justices were divided over whether various claims were expressly pre-empted under it. Notwithstanding the ambiguity of that pre-emption provision in *Cipollone*, and the dispute over which claims it cov-

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[5] The *Gills* court also reasoned that it was "quite plausible that Congress intended [the pre-emption clause] . . . to apply not only to statutes and regulations but to conflicting common law standards as well." *Gills*, 829 F.Supp. at 898. We have previously rejected such a reading of the pre-emption clause, because it would render the savings clause a redundancy. *Taylor*, 875 F.2d at 824.

ered, a majority of the Supreme Court still held that the provision provided a reliable indicium of congressional intent.

Finally, the Manufacturers and their amici shift the focus of their attack and target *Taylor*'s holding that common law tort claims are not expressly pre-empted by the Safety Act. They argue that that holding was vitiated by *Cipollone* even though different statutes were involved and there was no savings clause in the *Cipollone* statutes. It is true that one of the factors this Court considered in *Taylor* was that the pre-emption clause did not expressly mention state common law. 875 F.2d at 824-25. It is also true that *Cipollone* found express pre-emption of some claims even though the pre-emption clauses in that case also did not mention state common law. Those facts do not mean that *Cipollone* overruled *Taylor*'s conclusion, which is equally applicable to these cases, that the claims were not expressly pre-empted.

Cipollone does not say that whether a pre-emption clause mentions state common law is a question that is irrelevant or of little importance. *Cipollone*, unlike *Taylor*, did not involve a situation where Congress' failure to mention common law actions in a pre-emption clause was made doubly conspicuous by its explicit reference to common law liability in a savings clause. In the Safety Act involved in *Taylor*, Congress did not explicitly say that common law liability was pre-empted, but it did explicitly say that common law liability was saved. That was not the situation in *Cipollone*. Even without considering the failure of the pre-emption clause to mention state common law, because of the savings clause we still "conclude that the Safety Act cannot be construed as unambiguously manifesting an intention to pre-empt appellants' common law claims." *Taylor*, 875 F.2d at 825.

CONCLUSION

The task of deciding this appeal primarily involves laying the *Cipollone* decision over the *Taylor* decision. Having done that, we see that those two decisions mandate a holding that the Plaintiffs' common law claims are not pre-empted by the Safety Act. We are required to reverse the decisions of the district courts, which did not have the benefit of *Cipollone* when they ruled. The district courts' orders granting summary judgment on behalf of the Manufacturers are REVERSED.[6]

HILL, Senior Circuit Judge, dissenting:

The majority opinion in this case advances the growing view that because several recent Supreme Court opinions have found that federal regulations did not pre-empt state common law claims, the Supremacy Clause is no longer fashionable. I do not agree.

According to Article VI of the Constitution, the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Thus, it is well settled that state law that conflicts with federal law is "without effect." *Cipollone v. Liggett Group, Inc.*, —— U.S. ——, ——, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992) (citation omitted). In this case, federal law provides that Appellee manufacturers may produce vehicles equipped with airbrake systems (which are not antilock brakes) and Appellants argue for a state law that would not allow the manufacture of such vehicles. Insomuch as one conflicts with the other, both cannot survive. I conclude that the "supreme Law of the Land" must survive and an action brought premised upon the validity of the state's law must be dismissed.

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[6] Our reversal does not affect the grant of summary judgment as to the statutory cause of action in the *Myrick* case. See n. 3, above.

The Supreme Court has developed principles to guide pre-emption analysis to avoid unintended displacement of State authority over matters within States' historic police powers. In conducting a pre-emption inquiry, "a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption." *CSX Transp., Inc. v. Easterwood,* —— U.S. ——, ——, 113 S.Ct. 1732, 1737, 123 L.Ed. 2d 387 (1993). Therefore, pre-emption should not be found unless it is the "clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947). "Evidence of pre-emptive purpose is sought in the text and structure of the statute at issue." *Easterwood,* —— U.S. at ——, 113 S.Ct. at 1737.

Through the National Traffic and Motor Vehicle Safety Act (the "Safety Act") 15 U.S.C. § 1381, *et seq.,* Congress authorized the Secretary of Transportation to regulate motor vehicle safety. Under authority delegated by the Secretary, the National Highway Traffic Safety Administration("NHTSA") administers the Safety Act by promulgating appropriate minimum performance standards for various motor vehicle components. The NHTSA has devised far-reaching regulations governing the manufacture of vehicles. The regulation covering the performance of truck brake systems is 49 C.F.R. § 571.121 (1991) ("Standard 121").

Standard 121 has a long and tumultuous history. Its initial effective date was March 1, 1975. Standard 121 as originally promulgated effectively required the inclusion of antilock brake systems by requiring vehicles to be able to be stopped within certain distances at specified speeds without significant lockup. *See Paccar, Inc. v. National Highway Traffic Safety Admin.,* 573 F.2d 632, 637 (9th Cir.1978). In response to the Ninth Circuit Court of Appeals' opinion in *Paccar,* the NHTSA revised Standard 121 by adding a specific statement that the stopping

distance criteria and related performance requirements which necessitated antilock brakes were not applicable to trucks and trailers. Other sections of Standard 121 relating to performance standards for airbrake systems were left intact. The exemption of trucks and trailers from the antilock requirements was in effect at the time of manufacture of the two trucks involved in this case and remains in effect today. This scheme effectively gives manufacturers the choice of whether to install antilock brakes or airbrakes.

It is important to recognize what this case is *not* about. This is not a case where one may be held to have violated a state requirement to exercise due care because one has acted in a fashion permitted by law but dangerous under the particular circumstances surrounding the action. It is hornbook law that operation of a motor vehicle at the maximum speed permitted by law may violate the legally required duty to exercise due care when and if the circumstances surrounding the operation—rain, sleet, snow, poor visibility, crowded roadway, etc.—make such a speed careless. I submit, however, that one could not predicate a claim upon the operation of a vehicle at or under the allowed speed limit upon an assertion that the speed limit in the particular state ought to have been less than that determined by its legislature.

It is the latter type of claim attempted here. Appellees do not admit that state law "allows" federal law to establish permissible brake systems, but neither do they dispute that state law may make such systems unlawful under particular circumstances. Appellants say that the federal law, being wrong or poorly advised, must yield to a state law which may be found to have been violated by those who followed the federal law. There are no changing circumstances; the NHTSA has authorized airbrake systems on these vehicles and has, presumably, considered all circumstances extant in this land touching upon that authorization. The federal law governing

brakes on motor trucks is not subject to veto by a state judge instructing a state jury that it may disapprove of the federal standard and find that it violates state law.

The majority opinion reads the Supreme Court's recent pre-emption exposition in *Cipollone* as precluding any implied pre-emption analysis where Congress has included an express pre-emption clause in a statute. In this, I believe the majority has gone too far. Unquestionably, *Cipollone* limits the role of implied pre-emption where there is an express pre-emption clause. But nothing in the fact-specific holdings of *Cipollone* mandates that implied pre-emption is no longer viable in the face of an express pre-emption clause.

In *Cipollone,* the Supreme Court considered whether state law damage claims were pre-empted by provisions of the Federal Cigarette Labeling and Advertising Act, enacted in 1965, and its successor, the Public Health Cigarette Smoking Act of 1969. These acts mandate specific labels that must be included in the advertising and packaging of cigarettes. The Court held that the 1965 Act pre-empted state bodies only from mandating particular cautionary statements and did not pre-empt other state law damage actions. *Cipollone,* —— U.S. at ——, 112 S.Ct. at 2619. One of the reasons given by the Court is that "there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damage actions." *Id.,* —— U.S. at —— 112 S.Ct. at 2618. This language suggests that implied pre-emption by conflict remains a viable concept.

The Court analyzed pre-emption under the 1969 Act separately. Noting that the pre-emption clause in the 1969 Act was specifically given a broader reach by Congress, the Court analyzed each state law claim to determine if the "legal duty that is the predicate of the common law damages action" depended on subject matter governed by the federal regulation. *Cipollone,* —— U.S. at ——,

112 S.Ct. at 2621. The Court concluded that some of the common law claims were pre-empted and others were not. The significant aspect of the Court's holdings is that the gravamen of the pre-emption analysis was whether or not the common law claims were based on something that was not touched on by the federal regulation. Those claims that did not depend on regulated subject matter were not pre-empted.

The pre-emption inquiry is different in this case because Plaintiffs make no claims which are not covered by federal regulation. Unlike the Court in *Cipollone,* we are faced with state common law claims which are not expressly pre-empted but nevertheless rely upon subject mattter governed by federal regulations. Thus, the holdings in *Cipollone* are not controlling. *Cipollone* and this case would be the same if, in *Cipollone,* the only claim asserted was that the cigarette manufacturers were liable only because they had placed the warnings mandated by federal law on these packages.

The majority opinion also misconstrues the Supreme Court's opinion in *Easterwood.* The issue in *Easterwood* was whether state law claims of negligence with respect to warning devices at grade crossings and train operating speeds were pre-empted by the Federal Railroad Safety Act and regulations promulgated thereunder. The Court stated that the issue of pre-emption "depends on whether the regulations issued by the Secretary cover the subject matter of the two allegations, each of which we may assume states a valid cause of action." *Easterwood,* —— U.S. at ——, 113 S.Ct. at 1738. The Court concluded that federal speed limit regulations covered the subject matter of the common law of train speed, and thus expressly pre-empted the claim of excessive train speed. *Id.,* —— U.S. at ——, 113 S.Ct. at 1742.

With respect to the negligence claim about use of particular warning devices at grade crossings, the Court found that the applicable federal regulations did not cover the

same subject matter as the common law tort claims and concluded that the grade crossing claim was not pre-empted. *Easterwood,* —— U.S. at ——, 113 S.Ct. at 1742. After analyzing the federal regulations in its express pre-emption inquiry, the Court rejected petitioner's claim of implied conflict pre-emption "on the basis of the preceding analysis." *Id.,* —— U.S. at —— n. 12, 113 S.Ct. at 1742 n. 12. The majority reads this statement as reinforcing "the commands of *Cipollone* that where there is an express pre-emption provision, it is to be the alpha and omega of pre-emption analysis" because the Court did not conduct a separate implied pre-emption analysis after its express pre-emption probe. I believe that the Court did not conduct an implied conflict pre-emption analysis because, "on the basis of the preceding analysis," it found no conflict between the federal regulations and the common law negligence claim.

Unlike the factual scenarios considered by the Supreme Court in *Cipollone* and *Easterwood,* this case involves only state law claims that impose legal duties predicated on subject matter squarely governed by federal regulations. Standard 121 governs brake equipment that manufacturers may install on trucks and Plaintiffs' common law claims focus exclusively on the type of brake equipment installed by the manufacturers. I agree with the majority that we are bound by *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir.1989), *cert. denied,* 494 U.S. 1065, 110 S.Ct. 1781, 108 L.Ed.2d 783 (1990), and its holding that the Safety Act does not expressly pre-empt a common law tort claim regarding equipment installed on a vehicle where a NHTSA regulation affords the manufacturer an option between types of permissible equipment. Therefore, only the doctrine of implied pre-emption remains to resolve the conflict between Plaintiffs' claims of negligence for failure to install antilock brakes and Standard 121 which permits the installation of air-brake systems.

In *Public Health Trust v. Lake Aircraft, Inc.*, 992 F.2d 291 (11th Cir.1993), a prior panel of this court anticipated this scenario. *Lake Aircraft* involved a common law product liability claim of defective design of an airplane seat for failure to use an energy absorbing design. The applicable federal regulation stated that *if* manufacturers employed energy absorbing designs, the designs must comply with certain specifications. The seat at issue was not energy absorbing, but otherwise complied with federal regulations. After determining that the express pre-emption clause was inapplicable to matters covered by the tort claims, the court found no conflict between the federal regulation and the state law tort claims. Specifically, the court stated:

> Some question seems to exist about what should be concluded when a state regulation which lies outside the scope of an express pre-emption provision (which, under *Cipollone,* implies that the state law is *not* pre-empted) nonetheless *actually* clashes with federal law (which traditionally has implied that the state law is pre-empted).
>
> But the case we decide today presents no actual conflict. Federal aircraft design regulations did not require, but did *permit* manufacturers to use energy absorbing designs, such as the laced, cut-out portion featured in the pilot seat of the aircraft in this case. [Appellant] seeks to hold defendants liable for errors of omission: he claims defendants should have exceeded the minimum federal standards for aircraft design, but failed to do so. *Appellant does not contend defendants are liable, under state law, for an act of compliance with a federal requirement, nor does he challenge defendant's choice between two federally approved options analogous to the federal standards in the airbag cases. Cf. Taylor v. General Motors Corp.* (federal law mandated use of *either* seatbelts *or airbags,* so state law action with effect of

requiring airbags took away the belts-only option and was impliedly pre-empted).

Lake Aircraft, at 295 n. 5. (some emphasis added) (citations omitted). In contrast to *Lake Aircraft*, the case at bar does involve a challenge to a manufacturer's choice between two federally approved options analogous to the federal standards in *Taylor*.

As the Supreme Court acknowledged in *Cipollone*, the Supremacy Clause mandates that state law that conflicts with federal law is "without effect." Plaintiffs' common law negligence claims in this case depend on a finding that the manufacturers violated a duty, imposed by state law, of reasonable care by installing airbrake systems on the trucks at issue. Indeed, the trial judge would have to instruct the jury that state law required the jurors to determine if the manufacturers should be held liable for failing to include antilock brakes on the trucks. Standard 121 expressly permits the inclusion of airbrakes on trucks and trailers. The assertion of state law claims which would forbid the manufacture of brakes expressly permitted by federal law is a classic conflict where, under the Supremacy Clause, federal law must prevail. The conflict in this case is unavoidable—Plaintiffs assert state law said to forbid doing that which federal law permits.

State common law is law that may conflict with federal law just the same as state statutory law. In *Cipollone*, the Supreme Court faced the question of the scope of the phrase "no requirement or prohibition" and stated that the phrase "sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules." *Cipollone*, —— U.S. at ——, 112 S.Ct. at 2620. The Court continued by quoting an earlier case: "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay

compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Id.*, —— U.S. at ——, 112 S.Ct. at 2620, *quoting San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247, 79 S.Ct. 773, 780, 3 L.Ed.2d 775 (1959). Thus, the effect of a prevailing claim of common law negligence for failure to equip the trucks with antilock brakes would be the same as if the State of Georgia enacted a statute saying that a manufacturer cannot sell for use in Georgia any truck without antilock brakes.[1] As noted above, Standard 121 expressly permits manufacturers to install airbrake systems on trucks and trailers. If the Supremacy Clause means anything, it must mean that federal law prevails in this conflict.

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[1] Indeed, the legislature of the State of Georgia expressly adopted the common law as it stood on May 14, 1776 as binding law of Georgia. Georgia Code of 1863, § 1, ¶ 6. Thus, common law is Georgia law through legislative action. Furthermore, the Constitution of the state of Georgia expressly ratified and affirmed decisional law of Georgia and imbued court decisions with the force of law. *See* GA. CONST. art. XI, § 1, ¶ 3 (1982).

APPENDIX B

[Filed Mar. 26, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 1:91-CV-0465-JOF

BEN MYRICK, *et al.*,
Plaintiffs,
vs.
FRUEHAUF CORPORATION, *et al.*,
Defendants.

ORDER

This matter is before the court on defendant Freightliner Corporation's motion for summary judgment on grounds that plaintiffs' state law claims are preempted by federal law. Both parties have requested oral argument. However, because there are no disputed facts and disposition of defendant's motion turns purely on legal grounds, the request for oral argument will be DENIED.

I. FACTS

The following facts are undisputed. On February 6, 1989 a truck operated by Munson Transportation, Inc., collided with a vehicle being driven by plaintiff, Ben Myrick, on U.S. Highway 441 in Morgan County, Georgia. The Munson truck tractor was manufactured by defendant Freightliner Corporation. Its trailer was manufactured by defendant Fruehauf Corporation. Neither the truck nor trailer were equipped with anti-lock braking devices. Plaintiff seeks damages under state tort law on account of this alleged defect.

II. APPLICABLE LAW

Defendant Freightliner moves for summary judgment on grounds that plaintiff's state law tort claims are preempted by Standard Number 121, 49 C.F.R. § 571.121, promulgated under the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (hereinafter "Safety Act"). Standard 121 regulates air braking systems used on trucks, trailers, and buses.

Plaintiffs ask the court to treat Freightliner's motion for summary judgment as a motion to dismiss because no factual or evidentiary questions are involved.[1] It is true that defendants could have raised the preemption issue in a timely-filed motion to dismiss. However, it is also appropriate to consider preemption issues on summary judgment. *See, e.g., Papas v. Upjohn Co.*, 926 F.2d 1019, 1020 (11th Cir. 1991) (preemption of state law claims by federal pharmaceutical labeling regulations); *see also Crowe v. Fleming*, 749 F. Supp. 1135, 1137 (S.D. Ga. 1990) and cases cited therein. Defendants' motion will be treated as one for summary judgment.

A. *National Traffic and Motor Vehicle Safety Act*

The Safety Act contains both a preemption clause and a savings clause. The preemption clause provides,

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of the State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance as such

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[1] The court notes that plaintiff's brief was filed in violation of this court's case instructions. Plaintiff's brief exceeded the court's page limit by eight pages. Plaintiffs also failed to index their brief. Had this violation come to the court's attention earlier, by motion of the defendants or otherwise, plaintiffs' brief would have been stricken from the record.

> vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d). The savings clause provides, "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(c).

B. *Standard 121*

When it was originally adopted, certain provisions of Standard 121 imposed stopping distance requirements that could only be met through the installation of anti-lock braking devices. However, in *Paccar, Inc. v. National Highway Traffic Safety Administration*, 573 F.2d 632 (9th Cir. 1978), *cert. denied*, 439 U.S. 862 (1978), the Ninth Circuit ruled that the provisions of Standard 121 requiring heavier axles and anti-lock devices on trucks and trailers should be suspended. *Id.* at 643.[2] Following *Paccar*, the National Highway Traffic Safety Administration amended section 3 of Standard 121 to provide "notwithstanding any language to the contrary, sections S5.3.1, S5.3.1.1, S5.3.2, S5.3.2.1, S5.3.2.2, S5.7.1, S5.7.3(a), S5.7.3(b) of this standard are not applicable to trucks and trailers . . . ." However, those provisions were left in the standard so that they could be

> easily reinstated when suitable solutions to the requirements laid down by the Court are found. In addition, by retaining the standard's language in its entirety in its existing form, manufacturers are made aware of what the agency still considers to be reasonable standards for minimum acceptable performance, and those manufacturers that wish to construct their vehicles in accordance with the non-mandatory

[2] Although the regulation did not specifically require anti-lock braking systems, "as a practical matter and beyond doubt, that anti-lock was necessary to meet the standard." *Paccar*, 573 F.2d at 643 n.26.

> sections of the standard will have the necessary guidance to do so.

44 F.R. 46849 (1979). Thus, after Paccar and the amendment to Standard 121, installation of anti-lock braking devices is clearly "optional." The unstated but inescapable corollary is that manufacturers may comply with Standard 121 by opting to produce trucks and trailers without anti-lock devices.

C. *Implied Preemption*

Relying on *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), defendants argue that plaintiffs' state statutory and common law claims are "impliedly preempted" by Standard 121. In *Taylor*, the court reviewed the principle of implied preemption:

> Our analysis begins with the principle that federal law preempts state law when the state law creates "a potential frustration of the administrative scheme provided by [the federal law]," *Howard v. Uniroyal, Inc.*, 719 F.2d 1552, 1562 (11th Cir. 1983), or when the state law "interferes with the methods by which the federal statute was designed to reach [its] goal." *International Paper Co. v. Ouellette*, 479 U.S. 481, 494, 107 S. Ct. 805, 813, 93 L.Ed.2d 883 (1987).

The court held that plaintiff's state tort law claim against the defendant automobile manufacturers for failure to equip vehicles with air bags was "impliedly preempted by the Safety Act."[3]

[3] In *Taylor* the court reviewed the three types of federal preemption.

> First, Congress, in drafting a statute, may use language and dictates the extent to which the statute preempts state law. Second, despite the absence of such language, the wording of the statute or its legislative history may evince Congress' intention to occupy giving regulatory field to the exclusion of

The principle of implied preemption applies whether the federal law is embodied in a statute or regulation, *see Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta,* 458 U.S. 141, 153, 102 S. Ct. 3014, 3022, 73 L.Ed.2d 664 (1982) (holding that "[f]ederal regulations have no less pre-emptive effect than federal statutes"), and whether the state law is rooted in a statute, regulation, or common law rule. State common law claims are pre-empted because "the duties imposed through state common law damage actions have the effect of requirements that are capable of creating an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Stephen v. American Brands, Inc.,* 825 F.2d 312, 313 (11th Cir. 1987) (adopting decision and reasoning of *Cipollone v. Liggett Group, Inc.,* 789 F.2d 181, 187 (3d Cir. 1986), *cert. denied,* 479 U.S. 1043, 107 S. Ct. 907, 93 L.Ed.2d 857 (1987).

The *Taylor* court noted that there is no strong presumption against implied preemption and that preemptive intent may be inferred solely from effects. 875 F.2d at 826. "Where the preemptive intent behind the federal regulatory scheme is unclear from its statutory language or legislative history, the federal law nevertheless pre-empts the state law to the extent that ordinary application of the two laws creates a conflict." *Id.* (citing *Brown v. Hotel & Restaurant Employers & Bartenders International Union,* 468 U.S. 491, 501 (1984)).

In *Taylor* the applicable regulation allowed manufacturers to choose between manual seat belts and auto-

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state law. Third, even when Congress has not occupied the entire regulatory field, federal law nevertheless may implicitly preempt state law to the extent that state law conflicts with federal regulatory scheme. [Cites omitted].

Taylor, 875 F.2d at 822. The court found that the third type of preemption applied. *Id. See English v. General Electric,* —— U.S. ——, 110 S.Ct. 2270, 2275 (1990); *Easterwood v. CSX Transp., Inc.,* 933 F.2d 1548, 1552 (11th Cir. 1991).

matic passive restraint systems. Reviewing the pertinent Supreme Court cases, the court held that "a state cannot impose common law damages on individuals for doing what a federal act or regulation 'authorized them to do.'" 875 F.2d at 827 (citing *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.,* 450 U.S. 311, 318 (1981). "[A] state common law rule cannot take away the flexibility provided by a federal regulation, and cannot prohibit the exercise of a federally granted option." *Id.* at 827; *see Fidelity Federal Savings & Loan Ass'n v. De la Cuesta,* 458 U.S. 141, 155 (1982) (California common law rule that due on sale clauses were unenforceable was preempted by federal regulation that permitted but did not compel the use of due on sale clauses).

Plaintiffs attempt to distinguish *De la Cuesta,* arguing that there was no savings clause in that case. However, the Act's savings clause is not a bar to implied preemption. *Taylor,* 875 F.2d at 827 n.20.[4] *See also Kitts v. General Motors Corp.,* 875 F.2d 787, 789 (10th Cir. 1989); *Pokorny v. Ford Motor Co.,* 902 F.2d 1116, 1124 (3d Cir. 1990) (allowing manufacturer choice of restraint systems was an essential element of regulatory framework and preempted common law product liability claims); *Crowe v. Fleming,* 749 F. Supp. 1135 (S.D. Ga. 1990). The savings clause would protect a cause of action alleging that some component of a braking system was defective if the overall system met the performance

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[4] The court stated,

We reject the appellant's argument that the Safety Act savings clause forecloses a finding of implied preemption. *See Wood v. General Motors Corp.,* 865 F.2d 395, 415-16 (1st Cir. 1988) (citing *International Paper Co. v. Ouellette,* 479 U.S. 481, 107 S. Ct. 805, 93 L.Ed.2d 883 (1987), and *Texas & Pacific Railway v. Abilene Cotton Oil Co.,* 205 U.S. 426, 27 S. Ct. 350, 51 L.Ed. 553 (1907), for the proposition that "general" savings clause, such as that contained in the Safety Act, does not preclude a finding of implied preemption).

and design criteria in Standard 121. However, plaintiffs' claim is based on an allegation that defendants should have installed another type of braking system, not that some part of the system actually installed was inherently defective.

Even if the court were to assume, which it does not, that plaintiffs are correct in contending that the failure to install anti-lock devices constituted negligence or resulted in an inherently defective product, allowing plaintiffs' state statutory or common law claims to proceed in this action would, in effect, establish a performance standard stricter than those set forth in Standard 121. Such a result is prohibited by 15 U.S.C. § 1392(d) (state safety standards not identical to federal standards are preempted). *See Taylor*, 875 F.2d at 827 n.20; *Wood v. General Motors Corp.*, 865 F.2d 395, 402 (1st Cir. 1988) (followed in *Taylor*); *Kitts v. General Motors Corp.*, 875 F.2d 787, 789 (10th Cir. 1989) (following *Wood*).

In *Crowe v. Fleming, supra,* the court held that a common law claim based on failure to install reflective tape on the side of a trailer was preempted because the theory of recovery was in conflict with the method chosen by Congress to accomplish the goals of the Act and because the theory directly addressed the same aspect of performance. As in the case at bar, the standards regulated but did not require use of reflective tape. The court concluded that to allow the claim would establish a state regulation requiring use of reflective material.

Plaintiffs argue that *Taylor* may be distinguished because the regulation at issue there required manufacturers to choose between specified restraint systems while Standard 121 contains no federally mandated options. Plaintiffs contend that the exemption of trucks and trailers from the regulation's provisions regarding anti-lock brakes amounts to no regulation of anti-lock braking devices and, therefore, there is no conflict with state law.

However, the focus of plaintiffs' argument is too narrow. The question is not whether anti-lock braking devices are regulated by Standard 121 but whether the design and performance of truck and trailer air brake systems in general are regulated by the statute. If so, state law may not impose stricter or conflicting standards.

Only those parts of Standard 121 that would require the installation of anti-lock devices do not apply to trucks and trailers. Except for stopping distances, all other aspects of air brake systems on trucks and trailers are regulated by Standard 121, including: reservoirs; towing vehicle protection systems; pressure gauges and warning systems; brake actuation, release, and recovery times; deceleration rates and temperatures; parking brake systems; and road testing. Plaintiffs' claim that truck and trailer braking systems are no longer regulated after *Paccar* is untenable.

The amendment of Standard 121 to conform with the court's decision in *Paccar* was intended to preserve the option of *not* installing anti-lock braking devices until such devices had been improved and subjected to further testing. Deletion of the provisions that would have required anti-lock devices was intended to *promote* safety. Plaintiff's theory that failure to install such devices results in an inherently unsafe system directly conflicts with the purpose behind the amendment of Standard 121. Not only would a common law standard requiring the installation of anti-lock devices conflict with the federal standard, it would defeat the policy behind the Safety Act by imposing a design requirement that the Department of Transportation judges to be unsafe, having chosen not to require such devices until they are more reliable.

Plaintiffs' final argument is that the court's decision in *Taylor* is flawed and should not be followed. Plaintiffs are in effect asking this court to overrule the Eleventh Circuit. The court suggests that plaintiffs' counsel con-

sult a basic textbook on civil procedure or practice in the federal courts.

III. CONCLUSION

Defendants' motion for summary judgment [10-1] is GRANTED. The court DENIES both parties' request for oral arguments on the motion.

Although defendant Fruehauf Corporation did not join in Freightliner Corporation's motion for summary judgment, it appears that those claims are also subject to preemption for the reasons set forth above. Defendant Fruehauf is therefore GRANTED LEAVE to file a motion for summary judgment within ten (10) days of the entry of this order. While the motion must meet the requirements of Local Rule 220-5, Fruehauf need only show that the principles set forth above also apply to plaintiff's claim against it.

Plaintiffs shall have ten (10) days to respond to the motion. Plaintiffs' response should likewise be limited to showing that plaintiffs' claims against defendant Fruehauf should not be preempted. However, the court will not reconsider the legal issues resolved above. Both plaintiffs and defendants' briefs should be limited to five (5) pages.

SO ORDERED this 26th day of March, 1992.

/s/ J. Owen Forrester
J. OWEN FORRESTER
United States District Judge

APPENDIX C

[Filed May 20, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 1:91-CV-0465-JOF

BEN MYRICK and EMILY MYRICK,
Plaintiffs,

vs.

FREUHAUF CORPORATION and
FREIGHTLINER CORPORATION,
Defendants.

ORDER

This matter is before the court on plaintiffs' motion to modify its March 26, 1992 order granting summary judgment to defendant Freightliner Corporation. Plaintiff asks the court to delete footnote 1 and the last paragraph on page nine of that order.

Footnote 1 noted that plaintiff's brief exceeded the page limit contained in this court's *Case Instructions* and that the brief was not indexed, as required by those instructions. Plaintiffs note that there are no case instructions in the Federal Rules of Civil Procedure or the Local Rules for the Northern District of Georgia. Plaintiffs ask the court to delete footnote 1 because it is "unnecessary to the decision and disparaging."

The court's records indicate that all parties in the above-styled action were mailed a copy of a document entitled "*CASE INSTRUCTIONS:* BY THE ORDER OF

THE HONORABLE J. OWEN FORRESTER" in March of 1991. Footnote 1 of those instructions states "These instructions supplement the 1985 Local Rules of the Court . . . ." Paragraph 2 of those instructions limits briefs to twenty-five pages and requires all briefs in excess of fifteen pages to be indexed. Nonetheless, the court read and considered each and every page of plaintiffs' brief. The court encourages counsel for all parties to read carefully and to follow directions from the court.

The last paragraph on page 9 of the court's previous order states,

> Plaintiffs' final argument is that the court's decision in *Taylor* [*v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989)] is flawed and should not be followed. Plaintiffs are in effect asking this court to overrule the Eleventh Circuit. The Court suggests that Plaintiffs' counsel consult a basic textbook on civil procedure or practice in the federal courts.

Plaintiffs argue that Fed. R. Civ. P. 11 gives them permission to make a good faith argument for "the modification, or reversal of existing law . . . ." While the court shares some of plaintiffs' concerns about bureaucratic preemption of state tort law, this court and those who practice before it are bound by existing law as established and interpreted by the Eleventh Circuit Court of Appeals. The proper forum for arguing that *Taylor* is flawed is before that court. Plaintiffs' counsel must be aware that a federal district court is without jurisdiction to modify or reverse the decisions of a federal appellate court.

Plaintiffs' motion for modification of the court's March 26, 1992 order [24-1] is DENIED.

The court allowed defendant Freuhauf corporation ten days to file a motion for summary judgment. Subsequent to submission of defendant Freightliner Corporation's motion for summary judgment, the parties filed a dismissal

of plaintiffs' claims against defendant Freuhauf Corporation with prejudice. The Clerk of Court is, therefore, DIRECTED to enter FINAL JUDGMENT in favor of defendants and DISMISS this action.

SO ORDERED this 19th day of May, 1992.

/s/ J. Owen Forrester
J. OWEN FORRESTER
United States District Judge

APPENDIX D

[Filed Mar. 30, 1992]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action 1:91-cv-1128-MHS

JACK LINDSEY, Executor of the Estate of GRACE C. LINDSEY, Deceased, and JACK LINDSEY, as Surviving Spouse of GRACE C. LINDSEY, Deceased,
Plaintiff,

v.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP. and INTERNATIONAL HARVESTER COMPANY,
Defendants.

ORDER

This matter is before the Court on defendant Navistar International Transportation Corporation's motion for summary judgment. For the reasons stated below, the Court will grant defendant's motion.

This is a wrongful death action arising out of the an automobile accident in which Grace C. Lindsey was killed. On September 5, 1989, a truck operated by Tim Williams collided with a vehicle driven by Grace C. Lindsey on U.S. Highway 41 in Oconee County, Georgia. The truck tractor was manufactured by defendant Navistar International Transportation Corporation ("Navistar") in 1982. Neither the truck tractor nor trailer was equipped with an antilock braking system.

Plaintiff brought this action on theories of strict liability and negligence, alleging that defendant Navistar should have equipped the tractor with an antilock brake system. Defendant Navistar has moved for summary judgment on the grounds that plaintiff's state law tort claims are preempted by federal law, specifically, Standard Number 121, 49 C.F.R. § 571.121, promulgated pursuant to the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 ("the Act"). Standard 121 regulates air braking systems used on trucks, buses, and trailers.

This issue was recently considered in *Myrick v. Fruehauf Corporation,* 1:91-cv-0465-JOF (March 26, 1992). *See* Appendix A. In *Myrick,* Judge Forrester held that the Act and Standard Number 121 impliedly preempted state law claims of negligence and strict liability. Judge Forrester found that Standard 121 gives manufacturers the option of *not* installing an[ti]-lock braking devices and that any common law rule requiring otherwise would conflict with the federal standard. This Court finds persuasive and adopts as its reasoning Judge Forrester's opinion in *Myrick*.

Accordingly, the Court GRANTS defendant Navistar's motion for summary judgment [#7-1], DENIES defendant's request for oral argument [#8-1], and DIRECTS the clerk to enter judgment in favor of defendant Navistar.

IT IS SO ORDERED, this 27th day of March, 1992.

/s/ Marvin H. Shoob
MARVIN H. SHOOB
Senior Judge
United States District Court
Northern District of Georgia

APPENDIX E

[Filed May 18, 1994]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8386

BEN MYRICK and EMILY MYRICK,
Plaintiffs-Appellants,

versus

FREUHAUF CORPORATION,
Defendant,

FREIGHTLINER CORPORATION,
Defendant-Appellee.

No. 92-8387

JACK LINDSEY, Executor of the Estate of GRACE [C.] LINDSEY, Deceased, JACK LINDSEY, as Surviving Spouse of GRACE C. LINDSEY, Deceased,
Plaintiff-Appellant,

versus

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,
Defendant-Appellee,

INTERNATIONAL HARVESTER COMPANY,
Defendant.

No. 92-8536

BEN MYRICK and EMILY MYRICK,
Plaintiffs-Appellants,

versus

FREUHAUF CORPORATION,
Defendant,

FREIGHTLINER CORPORATION,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: EDMONDSON and CARNES, Circuit Judges, and HILL, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Ed James
United States Circuit Judge

APPENDIX F

[Filed Jul. 15, 1994]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8386

BEN MYRICK and EMILY MYRICK,
Plaintiffs-Appellants,

versus

FREUHAUF CORPORATION,
Defendant,

FREIGHTLINER CORPORATION,
Defendant-Appellee.

No. 92-8386

JACK LINDSEY, Executor of the Estate of GRACE C. LINDSEY, Deceased, JACK LINDSEY, as Surviving Spouse of GRACE C. LINDSEY, Deceased,
Plaintiff-Appellant,

versus

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,
Defendant-Appellee,

INTERNATIONAL HARVESTER COMPANY,
Defendant.

No. 93-8536

BEN MYRICK and EMILY MYRICK,
Plaintiffs-Appellants,

versus

FREUHAUF CORPORATION,
Defendant,

FREIGHTLINER CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

ORDER

(✓) The motion of Appellees, Freightliner Corp., et al. for a further stay of the issuance of the mandate is GRANTED to and including August 16, 1994, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of Appellees, Freightliner Corp., et al. for a further stay of the issuance of the mandate is DENIED.

/s/ Ed James
United States Circuit Judge